DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-418
Title: United States, Petitioner
v.
Anthony James Kebodeaux
Docketed: October 4, 2012
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (08-51185)
Decision Date: July 6, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 4 2012	Petition for a writ of certiorari filed. (Response due November 5, 2012)
Oct 16 2012	Order extending time to file response to petition to and including December 5, 2012.
Dec 5 2012	Brief of respondent Anthony James Kebodeaux in opposition filed.
Dec 5 2012	Motion for leave to proceed in forma pauperis filed by respondent Anthony James Kebodeaux.
Dec 19 2012	DISTRIBUTED for Conference of January 11, 2013.
Dec 21 2012	Reply of petitioner United States filed. (Distributed)
Jan 11 2013	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jan 11 2013	Petition GRANTED.
Feb 11 2013	SET FOR ARGUMENT ON Wednesday, April 17, 2013.
Feb 25 2013	Motion to dispense with printing the joint appendix filed by petitioner United States.
Feb 25 2013	Brief of petitioner United States filed.
Feb 28 2013	Record received from the U.S.D.C. Western District of Texas, El Paso Division. (1 Box)
Mar 4 2013	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Mar 8 2013	CIRCULATED.
Mar 15 2013	Record from U.S.C.A. for 5th Circuit is electronic.
Mar 27 2013	Brief of respondent Anthony James Kebodeaux filed. (Distributed)
Apr 1 2013	Record from U.S.C.A. for 5th Circuit is electronic.
Apr 3 2013	Brief amicus curiae of Cato Institute filed. (Distributed)
Apr 10 2013	Reply of petitioner United States filed. (Distributed)
Apr 17 2013	Argued. For petitioner: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: M. Carolyn Fuentes.

Assistant Federal Public Defender, San Antonio, Tex.

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

12-418

Supreme Court, U.S.
FILED
OCT 4 - 2012
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY JAMES KEBODEAUX

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A person who is required to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA) as a result of a conviction under federal law and who knowingly fails to register or update a registration as required by federal law is subject to criminal penalties under 18 U.S.C. 2250(a)(2)(A). Before SORNA was enacted, respondent was convicted of a military sex offense, completed service of his sentence, and was subject to a federal obligation to register as a sex offender under pre-SORNA law. The court of appeals held in this case that SORNA is unconstitutional as applied to respondent on the ground that the statute exceeded Congress's powers under Article I of the Constitution. The questions presented are as follows:

1. Whether the court of appeals erred in conducting its constitutional analysis on the premise that respondent was not under a federal registration obligation until SORNA was enacted, when pre-SORNA federal law obligated him to register as a sex offender.

2. Whether the court of appeals erred in holding that Congress lacks the Article I authority to provide for criminal penalties under 18 U.S.C. 2250(a)(2)(A), as applied to a person who was convicted of a sex offense under federal law and completed his criminal sentence before SORNA was enacted.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY JAMES KEBODEAUX

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-73a) is reported at 687 F.3d 232. A prior opinion of the court of appeals (App., *infra*, 75a-113a) is reported at 647 F.3d 605, and another prior opinion is reported at 634 F.3d 293. The opinion of the district court (App., *infra*, 114a-132a) denying respondent's motion to dismiss is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the United States Constitution provides in relevant parts as follows:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;
>
> * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> * * *
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.

U.S. Const. Art. I, Sec. 8, Cls. 1, 3, 14, and 18.

Relevant statutory provisions are reprinted in the appendix to this petition. App., *infra*, 177a-228a.

STATEMENT

Following a bench trial in the United States District Court for the Western District of Texas, respondent was convicted of failing to register or update his registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to one year and one day of imprisonment, to be followed by five years of supervised release. The court of appeals reversed that conviction

on the ground that 18 U.S.C. 2250(a)(2)(A) is unconstitutional as applied to respondent. App., *infra*, 1a-73a, 78a.

1. a. "Sex offenders are a serious threat in this Nation," in large part because "the victims of sexual assault are most often juveniles" and because "convicted sex offenders * * * are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune* v. *Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion); see *Smith* v. *Doe*, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). As a result, Congress has frequently enacted legislation to encourage and assist States to keep track of sex offenders' addresses and to make information about sex offenders available to the public "for its own safety." *Id.* at 99.

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (42 U.S.C. 14071). Among other things, the Wetterling Act encouraged States, as a condition of receiving federal funding, to adopt sex-offender-registration laws meeting certain minimum standards. See *Smith*, 538 U.S. at 89-90. By 1996, every State and the District of Columbia had enacted a sex-offender-registration law. *Id.* at 90.

In 1996, Congress bolstered the minimum federal standards by adding a mandatory community notification provision to the Wetterling Act. See Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (42 U.S.C. 14071(e)). Congress also strengthened the national effort to ensure the registration of sex offenders by directing the Federal Bureau of Investigation (FBI) to create a national sex-offender database, requiring life-

time registration for certain offenders, and making the failure of certain persons to register a federal crime, subject to a penalty of imprisonment of up to one year (in the case of a first offense) or ten years (in the case of a second or subsequent offense). See Pam Lychner Sexual Offender Tracking and Identification Act of 1996 (Lychner Act), Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. 14072); see also *Carr* v. *United States*, 130 S. Ct. 2229, 2238 (2010).

In 1997, Congress expanded the Lychner Act's federal criminal penalty for failure to register to include persons who had been convicted of federal sex offenses (including military sex offenders). Department of Justice Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, Tit. I, § 115(a)(2)(F) and (6)(C), 111 Stat. 2463-2464 (42 U.S.C. 14071(b)(7), 14072(i) (Supp. III 1997)). As further amended in 1998, the federal criminal penalty applied to any individual convicted of specified federal or military sex offenses who "knowingly fail[ed] to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation." Department of Justice Appropriations Act, 1999, Pub. L. No. 105-119, Div. A, Tit. I, § 123(3), 112 Stat. 2681-73 (42 U.S.C. 14072(i)(3) and (4) (2006)); see Office of the Att'y Gen., U.S. Dep't of Justice, *Megan's Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended*, 64 Fed. Reg. 585 (Jan. 5, 1999) (noting that 1998 legislation "amended the federal failure-to-register offense (42 U.S.C. 14072(i)) in order to

bring within its scope federal and military sex offenders who fail to register").[1]

b. Despite those legislative efforts, Congress grew concerned about "loopholes and deficiencies" in the existing assortment of registration and notification statutes. H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20 (2005). On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. 16901 *et seq.*). SORNA was intended, among other things, to make "more uniform and effective" the "patchwork" of federal and state sex-offender-registration systems that were already in effect. *Reynolds* v. *United States*, 132 S. Ct. 975, 978 (2012). As this Court recently summarized, SORNA sought to do that

> by repealing several earlier federal laws that also (but less effectively) sought uniformity; by setting forth comprehensive registration-system standards; by making [certain] federal funding contingent on States' bringing their systems into compliance with those standards; by requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and by creating federal criminal sanctions applicable to those who violate the Act's registration requirements.

---

[1] Statutes passed in the years following these amendments continued to enhance federal registration and notification requirements. See, *e.g.*, Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (requiring sex offenders to provide notice concerning institutions of higher education at which they work or are students); PROTECT Act, Pub. L. No. 108-21, §§ 604-605, 117 Stat. 688 (requiring States to make sex-offender-registry information available on the Internet).

Ibid.[2]

SORNA requires that every "sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a). A "sex offender," in turn, is defined as "an individual who was convicted of" an offense that falls within the statute's defined offenses. 42 U.S.C. 16911(1) and (5)-(7). SORNA also specifies, among other things, the kinds of information that must be collected as part of registration (42 U.S.C. 16914), the length of time that offenders must remain registered (42 U.S.C. 16915), and the frequency with which a sex offender must appear in person and verify the registry information (42 U.S.C. 16916). SORNA requires States to adopt the specified federal standards or risk losing federal funds. 42 U.S.C. 16912, 16925.[3]

To enforce SORNA's registration requirements, Congress made noncompliance a federal crime in certain circumstances. As relevant here, SORNA makes it a federal crime for a person to knowingly fail to register as a sex offender (or to update a registration) as required by SORNA if that person either

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[2] SORNA repealed the Wetterling Act and related provisions (42 U.S.C. 14071, 14072 (2006)) effective roughly three years after its enactment. SORNA § 129, 120 Stat. 600-601.

[3] A majority of States have either already implemented SORNA's standards in their programs or are continuing to work toward that end with dedicated federal funding. Sixteen States have achieved substantial implementation of SORNA in their programs. See smart.gov/newsroom_jurisdictions_sorna.htm (last visited Oct. 3, 2012). Twenty-nine others have been "approved for reallocation of the funding penalty to work solely towards furthering SORNA implementation activities and efforts." Smart.gov/newsroom.htm (last visited Oct. 3, 2012).

> (2)(A) is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country.

18 U.S.C. 2250(a). In *Carr*, this Court held that the interstate travel referred to in Subparagraph (B) must occur after SORNA became effective, but the Court also observed, with respect to Subparagraph (A), that "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." 130 S. Ct. at 2238.

Sex offenders convicted before SORNA's July 2006 enactment were not required to register under SORNA until the Attorney General exercised his delegated authority under 42 U.S.C. 16913(d) to "validly specif[y] that the Act's registration provisions apply to them." *Reynolds*, 132 S. Ct. at 980. On February 28, 2007, the Attorney General issued an interim rule, effective on that date, specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to [SORNA's] enactment." 28 C.F.R. 72.3. On July 2, 2008, the Attorney General promulgated final guidelines for the States and other jurisdictions on matters of SORNA's implementation. See Office of the Att'y Gen., U.S. Dep't of Justice, *The National Guidelines for Sex Offender Registration and Notifica-*

tion, 73 Fed. Reg. 38,030. Those guidelines were issued after notice and comment and reaffirmed SORNA's application to all sex offenders. *Id.* at 38,035-38,036, 38,046, 38,063. On December 29, 2010, the Federal Register published an Attorney General order finalizing the interim rule, with one clarifying change in an example to avoid any inconsistency with this Court's decision in *Carr*, *supra*. See Office of the Att'y Gen., U.S. Dep't of Justice, *Applicability of the Sex Offender Registration and Notification Act*, 75 Fed. Reg. 81,849 (28 C.F.R. 72.3).[4]

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[4] The courts of appeals are divided on precisely when SORNA's registration requirements became applicable to pre-enactment sex offenders. See *United States* v. *Mattix*, No. 12-30013, 2012 WL 4076148, at *2-*3 (9th Cir. Sept. 17, 2012) (holding SORNA applicable to pre-enactment sex offenders as of August 1, 2008); *United States* v. *Stevenson*, 676 F.3d 557, 561-562 (6th Cir. 2012) (same), cert. denied, No. 11-10520 (Oct. 1, 2012); *United States* v. *Johnson*, 632 F.3d 912, 930-933 (5th Cir.) (finding no prejudice in applying SORNA to a pre-enactment sex offender after March 30, 2007—30 days after publication of the interim rule), cert. denied, 132 S. Ct. 135 (2011); *United States* v. *Dean*, 604 F.3d 1275, 1281 (11th Cir.) (holding SORNA applicable to pre-enactment sex offenders on February 28, 2007), cert. denied, 131 S. Ct. 642 (2010); *United States* v. *Gould*, 568 F.3d 459, 469-470 (4th Cir. 2009) (same), cert. denied, 130 S. Ct. 1686 (2010); *United States* v. *Dixon*, 551 F.3d 578, 583 (7th Cir. 2008) (same), rev'd on other grounds *sub nom. Carr* v. *United States*, 130 S. Ct. 2229 (2010). Respondent was convicted for his failure to register or update his registration as a sex offender after issuance of the Attorney General's February 28, 2007, interim SORNA rule, but before issuance of the final SORNA guidelines. App., *infra*, 78a, 115a, 169a. Under Fifth Circuit law, respondent was required to register under SORNA at the time of his offense and respondent did not argue otherwise on appeal. See *id.* at 2a n.1 (citing *Johnson*, *supra*); cf. *id.* at 118a (arguing in district court that interim rule violated the Administrative Procedure Act).

2. In May 1999, respondent, who was then in the United States Air Force, was convicted by a court-martial of carnal knowledge of a female under the age of 16, in violation of Article 120(b) of the Uniform Code of Military Justice, 10 U.S.C. 920(b) (1994 & Supp. II 1996). App., *infra*, 116a, 167a. He received a sentence of confinement for three months and a bad-conduct discharge. *Id.* at 116a.

Sometime after the 1999 completion of his sentence, respondent moved to San Antonio, Texas, and later to El Paso, Texas. App., *infra*, 167a. In early August 2007, he registered with El Paso authorities as a sex offender. *Id.* at 167a-168a. Later that month, however, he moved back to San Antonio and failed to update his registration. *Id.* at 169a. In March 2008, he was located in San Antonio and arrested. *Ibid.*

3. In April 2008, a federal grand jury in the Western District of Texas returned a one-count indictment charging respondent with knowingly failing to register and update a registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a)(2) and (3). App., *infra*, 115a. Respondent moved to dismiss the indictment, contending, *inter alia*, that Section 2250 exceeds Congress's authority under the Commerce Clause. *Id.* at 118a. The district court denied the motion to dismiss, *id.* at 114a-132a, and respondent was convicted following a bench trial on stipulated facts, *id.* at 78a. The district court sentenced respondent to imprisonment for one year and one day, to be followed by five years of supervised release. *Ibid.*[5]

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[5] Respondent's supervised release began in January 2009, but the district court later revoked that release and sentenced him to an additional 17 months of imprisonment for violating his conditions of release. Doc. 19, at 1, 3, *United States* v. *Kebodeaux*, No. 5:10-cr-117-

4. On respondent's appeal, a panel of the court of appeals affirmed respondent's conviction (App., *infra*, 75a-113a), but the panel's opinion was vacated by the court's decision to rehear the case en banc (*id.* at 74a). After new briefing and argument, a divided court, sitting en banc, reversed respondent's conviction (*id.* at 1a-73a), holding that Section 2250(a)(2)(A) is unconstitutional as applied to persons who had been convicted of sex offenses under federal law, but who had served their sentences and been "unconditionally released" by the federal government before SORNA was enacted in 2006, *id.* at 2a-4a.

a. The majority opinion focused on what it called "former federal sex offenders," by which it meant persons whose sex-offense convictions came under federal law but who had been "unconditionally released from [the federal government's] jurisdiction before SORNA's passage in 2006." App., *infra*, 3a, 4a, 41a. With respect to respondent, the court concluded that, by the time SORNA was enacted, he had "fully served" the sentence associated with his sex offense, and "[h]e was no longer in federal custody, in the military, under any sort of supervised release or parole, or in any other special relationship with the federal government." *Id.* at 2a. In explaining what it meant by "unconditional release," the court rejected the contention—advanced by both the government (Gov't C.A. En Banc Br. 23-24 & nn.4-5) and a dissenting opinion (App., *infra*, 65a-73a)—that respondent had in fact been subject to a federal requirement to register as a sex offender "ever since his 1999 conviction," *id.* at 4a n.4. The court concluded that, under pre-SORNA federal law, the only sex offenders who

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XR (W.D. Tex. Sept. 30, 2010). Respondent completed that term of imprisonment in June 2011.

were "subject to federal registration for intrastate changes in residence" were those who were required to register directly with the FBI because they lived in States where sex-offender registries were not compliant with federal guidelines. *Ibid.* (citing 42 U.S.C. 14072(g)(1)-(3) and (i) (2000) (repealed by SORNA)). The court found that respondent's "state of residence, Texas, was compliant with federal guidelines at the time of his offense" and that he was therefore "subject only to state, not federal, registration obligations" under pre-SORNA law. *Ibid.*

b. Based on its premise that respondent had been "*unconditionally* let * * * free" by the federal government years before SORNA was enacted, the court of appeals concluded that Congress lacked a "jurisdictional basis" to regulate his subsequent conduct because "he once committed a [federal] crime. App., *infra*, 4a.

The court of appeals first considered the Necessary and Proper Clause. It rejected the government's argument that "its power to criminalize the conduct for which [respondent] was originally convicted includes the authority to regulate his movement even after his sentence has expired and he has been unconditionally released." App., *infra*, 6a. The court discussed the five considerations that informed this Court's analysis in *United States* v. *Comstock*, 130 S. Ct. 1949 (2010), in which the Court sustained Congress's power to provide for the civil commitment of sexually dangerous federal prisoners beyond the time when they would otherwise have been released from custody. The majority found that most of those considerations support respondent. App., *infra*, 7a-24a. In its view, SORNA's "regulation of an individual, after he has served his sentence and is no longer subject to federal custody or supervision, solely

because he once committed a federal crime, (1) is novel and unprecedented despite over 200 years of federal criminal law, (2) is not 'reasonably adapted' to the government's custodial interest in its prisoners or its interest in punishing federal criminals, (3) is unprotective of states' sovereign interest over what intrastate conduct to criminalize within their own borders, and (4) is sweeping in the scope of its reasoning." *Id.* at 24a.

The court of appeals then rejected the government's "alternative argument" that SORNA's registration requirements for federal sex offenders are "necessary and proper to effect Congress's Commerce Clause power." App., *infra*, 24a-25a. It concluded that, as applied to federal sex offenders, SORNA is not a permissible regulation of the use of the channels of interstate commerce because that power has never been extended to "those who are not presently using [the channels of interstate commerce] but might do so"; because it found "no limiting principle that would allow the federal government to track and arrest former sex offenders because they might someday travel interstate, but not allow it to do the same to anyone else for that same reason"; and because it "would violate basic tenets of federalism" to give the federal government the power "to do exactly what a state could already do itself, in an area completely unrelated to commerce, just because criminals, like all human beings, can potentially cross state lines." *Id.* at 30a, 33a, 34a. The court concluded that the statute cannot be justified as a regulation of persons *in* interstate commerce because "a person who only *might* cross state lines is not engaging 'in interstate commerce.'" *Id.* at 36a. It also concluded that the statute does not permissibly regulate conduct that has substantial effects on in-

terstate commerce because "the statute here regulates non-economic, intrastate conduct." *Id.* at 38a.

The court of appeals emphasized that its "finding of unconstitutionality * * * does not affect the registration requirements for (1) any federal sex offender who was in prison or on supervised release when the statute was enacted in 2006 or (2) any federal sex offender convicted since then." App., *infra*, 4a; *id.* at 41a-42a ("Every federal sex offender subject to federal custody or supervision when SORNA was enacted, or who was convicted since then, is unaffected."). The court also noted that its reasoning would not implicate a prosecution of a federal sex offender when "[s]ome other jurisdictional ground, such as interstate travel," is present. *Id.* at 4a.

c. Judge Owen filed an opinion concurring in the judgment. App., *infra*, 42a-46a. She rejected the majority's understanding of the federal criminal penalties in place at the time of respondent's release from custody, agreeing instead with five of the dissenting judges that respondent "could have been prosecuted under [pre-SORNA] *federal* law * * * for knowingly failing to register in any State in which he resides," including for "mov[ing] from El Paso, Texas to San Antonio, Texas and fail[ing] to notify Texas authorities of this intrastate change in residence in the manner required by state law." *Id.* at 42a-43a, 43a-44a. In Judge Owen's view, "Congress was well within its powers under the Necessary and Proper Clause to impose conditions such as intrastate registration and reporting requirements on federal sex offenders in connection with their convictions and sentencing." *Id.* at 44a. She concluded, however, that SORNA had impermissibly altered "the reporting requirements imposed at the time [respondent] was sentenced" and had "increased the punishment for

failure to comply with reporting requirements." *Id.* at 46a. Judge Owen thus concluded that "Congress could not constitutionally apply SORNA to [respondent's] intrastate relocations under either the Necessary and Proper Clause or the Commerce Clause." *Ibid.*

d. Judge Haynes filed a dissenting opinion joined by Judges King, Davis, Stewart, and Southwick. App., *infra*, 61a-73a. She concluded that Section 2250(a)(2)(A) is both facially constitutional and constitutional as applied to respondent. *Ibid.* Even assuming arguendo that the majority had correctly concluded that Congress would be unable to impose a registration requirement on a federal sex offender after he has been unconditionally released, she determined that Congress had not done that here, because respondent "was, in fact, continuously subject to federal registration authority from the time of his release through SORNA's inception (and thereafter)." *Id.* at 66a. Judge Haynes explained that, under pre-SORNA federal law, respondent was required to register as a sex offender for at least ten years, regardless of which State he chose to reside in after his release from federal custody. *Id.* at 69a. Although Judge Haynes acknowledged that SORNA had "revamped prior federal registration requirements," she concluded that it would "make[] little sense to contend that Congress lost its power or 'jurisdictional hook' over [respondent] simply because it updated the national sex-offender registration system laws." *Id.* at 71a, 72a. She saw "no reason to distinguish the jurisdiction (as a matter of federal power) exercised over [respondent] under SORNA from that exercised under its predecessor sex offender registry laws that applied to [respondent]." *Id.* at 73a. Accordingly, she concluded that, on the basis of the majority's assumption "that [respondent's] convic-

tion would be constitutional had SORNA been enacted while he was in prison or on supervised release, then his conviction is constitutional given the continuous federal jurisdiction Congress exercised over [respondent] from the time he committed his original sex crime, through his imprisonment, at the time of his release, through SORNA's passage, and to the present day." *Ibid.*

e. Judge Dennis also filed a dissenting opinion, joined by Judge King, which concluded that Section 2250(a)(2)(A) is valid as a necessary and proper means of implementing the national registration requirement imposed by 42 U.S.C. 16913, which is itself supported by Congress's powers under the Spending Clause. App., *infra*, 46a-61a. Judge Dennis criticized the majority for analyzing only Congress's Commerce Clause and Necessary and Proper Clause powers, when Congress "plainly used three, not just two, of its constitutional powers." *Id.* at 50a. He concluded that SORNA's registration provisions "are manifestly rationally adapted to carry Congress's spending power into execution for the legitimate purpose of establishing a comprehensive national system" for sex-offender registration and notification. *Id.* at 54a. He also concluded that "Section 2250(a)(2)(A) is necessary and proper to bring about parity and a consistent level of enforcement, monitoring and tracking of all sex offenders, so that laxity toward federal sex offenders does not disrupt or interfere with Congress's enumerated powers sought to be executed through SORNA," and that Section 2250(a)(2)(B), which requires interstate travel, is a legitimate exercise of Congress's Commerce Clause authority. *Id.* at 55a, 56a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that 18 U.S.C. 2250(a)(2)(A) is unconstitutional as applied to a person who was con-

victed of a federal sex offense but who was "*unconditionally* let * * * free" before Congress enacted SORNA in 2006. App., *infra*, 4a. That decision precluded federal prosecution of respondent for failing to update his registration as a sex offender. Even though the court of appeals limited the reach of its invalidation of Section 2250(a)(2)(A), its declaration that a federal statute is unconstitutional as applied to a class of convicted federal sex offenders warrants this Court's review. The court of appeals' decision is flawed and disruptive of an important national scheme.

As a threshold matter, the court of appeals misunderstood the registration obligations (and accompanying criminal penalties) that federal law imposed on respondent even before SORNA was enacted. That crucial misunderstanding was the foundation for the court's constitutional conclusion that Congress could not "reassert jurisdiction" over persons who had previously been "unconditionally released from [federal] custody." App., *infra*, 11a. In fact, respondent was under a continuous federal registration obligation. Because the court of appeals gave no indication that the statute would be invalid as applied to persons who had *not* been unconditionally released before SORNA, this Court should correct the court of appeals' threshold error, vacate the decision below, and remand for the court of appeals to reconsider the constitutional question based on an accurate understanding of the statutory scheme. Cf. *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) ("when we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing").

The court of appeals' constitutional analysis was flawed even on its own terms. Section 2250 is an im-

portant part of Congress's effort to make "more uniform and effective" the "patchwork" of federal and state sex-offender-registration systems created by many legislative enactments in the 1990s and early 2000s. *Reynolds* v. *United States*, 132 S. Ct. 975, 978 (2012); see pp. 3-5, *supra*. The court of appeals erroneously concluded that Congress exceeded its Article I powers in applying Section 2250(a)(2)(A) to persons who are required to participate in the national sex-offender-registration system precisely because their previous sex-offense conviction occurred under federal law. This Court has previously observed that "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Carr* v. *United States*, 130 S. Ct. 2229, 2238 (2010). Congress has ample authority to penalize a federal sex offender for failing to register whether or not he was already under a federal registration obligation when released from federal custody.

A. The Court Of Appeals Erroneously Concluded That Respondent Was Not Already Subject To A Federal Penalty For Future Failures To Register When He Completed The Sentence Imposed For His Federal Sex Offense

The threshold premise of the court of appeals' reasoning is that respondent was "unconditionally released" by the federal government in 1999, well before the 2006 enactment of Section 2250(a)(2)(A) as part of SORNA. The court's opinion uses the phrase "unconditionally released" or "unconditional release" nine times. App., *infra*, 2a, 3a, 4a & n.4, 6a, 11a, 23a, 41a, 42a. Those phrases were woven into the court's opinion because a crucial premise of its analysis was that respondent was

someone "with whom the federal government had previously severed all ties." *Id.* at 23a. The constitutional problem on which the court focused, therefore, was Congress's purported attempt to "reassert jurisdiction over someone * * * just because he once committed a federal crime," *id.* at 11a. As Judge Haynes explained in her dissenting opinion, however, the court of appeals simply erred in concluding that respondent had ever been unconditionally released from federal jurisdiction. *Id.* at 65a-73a. To the contrary, federal law already in effect when respondent completed the sentence for his federal sex offense in 1999 required him to register as a sex offender and imposed federal criminal penalties for any knowing failure to do so.[6]

1. a. Federal sex-offender-registration laws were already in effect when respondent was released from military custody in 1999, and those laws remained in effect until 2009. See 42 U.S.C. 14072(i) (2006); SORNA §§ 124, 129, 120 Stat. 598, 600-601 (repealing Wetterling

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[6] The threshold question of whether respondent was already subject to registration requirements enforceable under federal law in 1999 was both pressed and passed upon below. Before the en banc court, the government explained that "a federal criminal penalty for failure to register * * * has expressly applied to federal and military sex offenders since 1997" and that "[respondent's] military sex offense has triggered a federal sex-offender-registration requirement" ever since he committed his crime in March 1999. Gov't C.A. En Banc Br. 23, 24 n.5. Accordingly, the government contended that even if the court of appeals "were to hold that Congress's authority to require registration by a federal sex offender, qua federal offender, depends on the existence at the time of offense of a federal reporting requirement, [respondent's] conviction would still stand." *Id.* at 24 n.5. The court of appeals squarely passed upon the threshold question, concluding that "before the passage of SORNA, [respondent] was subject only to state, not federal, registration obligations." App., *infra*, 4a n.4.

Act upon completion of three-year implementation period for SORNA). Among those provisions were 42 U.S.C. 14072(i)(3) and (i)(4) (2006), which took effect in November 1998. See 1998 Appropriations Act, § 115(c)(1), 111 Stat. 2467 (effective date).

Section 14072(i)(3) imposed criminal liability on "[a] person who is * * * described in section 4042(c)(4) of title 18, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation." 42 U.S.C. 14072(i)(3) (2006). The class of persons described in 18 U.S.C. 4042(c)(4) included those who had been convicted of any enumerated federal sex offenses or "other offense[s] designated by the Attorney General as a sexual offense for purposes of this subsection." 18 U.S.C. 4042(c)(4)(A)-(E) (2000). In 1998, the Attorney General exercised his authority under Section 4042(c)(4)(E), designating, *inter alia*, the military offense of carnal knowledge "as a sexual offense." See 28 C.F.R. 571.72(b)(2); Bureau of Prisons, U.S. Dep't of Justice, *Designation of Offenses Subject to Sex Offender Release Notification*, 63 Fed. Reg. 69,386 (Dec. 16, 1998). Accordingly, at the time of his release in 1999 and until well after SORNA's enactment, Section 14072(i)(3) applied to respondent and subjected him to federal criminal penalties for any knowing failure to register as a sex offender in any State in which he lived, worked, or attended school. See 42 U.S.C. 14072(i)(3) (2006); App., *infra*, 68a-69a (Haynes, J., dissenting).

Section 14072(i)(4) also imposed federal criminal liability on "[a] person who is * * * sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105-119" and who knowingly fails to register

in any State in which he lives, works, or attends school following his release from prison or his being sentenced to probation. 42 U.S.C. 14072(i)(4) (2006). The specified section of Public Law 105-119 required the Secretary of Defense to "specify categories of conduct punishable under the Uniform Code of Military Justice which encompass a range of conduct comparable to that described in [42 U.S.C. 14071(a)(3)(A) and (B)], and such other conduct as the Secretary deems appropriate." 1998 Appropriations Act, 111 Stat. 2466-2467 (10 U.S.C. 951 note (2000)). On December 23, 1998, the Assistant Secretary of Defense designated the covered military offenses, which included the offense of carnal knowledge for which respondent was convicted. See App., *infra*, 171a-176a. Accordingly, at the time of his release in 1999 and until well after SORNA's enactment, Section 14072(i)(4) also applied to respondent and subjected him to federal criminal penalties for any knowing failure to register as a sex offender in any State in which he lived, worked, or attended school. 42 U.S.C. 14072(i)(4) (2006); see App., *infra*, 42a & n.1, 43a-44a, 46a (Owen, J., concurring in the judgment).[7]

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[7] Although the government did not rely on Section 14072(i)(4) in the court of appeals, Judge Owen recognized that respondent had a federal registration obligation under 42 U.S.C. 14072(i)(4) (2006) when he completed his sentence and that he could have been prosecuted under federal law for failing to register. See App., *infra*, 42a-44a & n.1. But she concurred in the judgment because, in her view, SORNA expanded the federal obligation and increased the authorized punishment. *Id.* at 46a. Those adjustments in the scope and degree of the federal registration obligation do not alter the fact that Congress continuously exercised regulatory authority over respondent upon his release to ensure that he register as a sex offender. No break or gap existed in that assertion of authority.

b. The court of appeals' opinion therefore rests on a misreading of pre-SORNA law. The majority below understood pre-SORNA law to impose federal registration requirements only on those sex offenders who were required to register directly with the FBI because they resided in States where sex-offender-registration programs did not meet minimum federal standards. App., *infra*, 4a n.4. Because respondent's State of residence, Texas, was not among those States, the court reasoned that he "was not subject to federal registration requirements." *Ibid.*

By focusing only on the distinct requirement that certain sex offenders register directly with the FBI, the court of appeals overlooked the federal registration requirements that were imposed on federally convicted sex offenders by virtue of 42 U.S.C. 14072(i)(3) and (i)(4) (2006). The former requirement—direct registration with the FBI—was indeed limited to those sex offenders residing in States whose registration programs were not "minimally sufficient." 42 U.S.C. 14072(a)(3), (c), (g)(2) and (i)(1) (2006). But the court of appeals' belief that no federal requirement to register existed absent a requirement to register directly with the federal government is unfounded. The federal scheme regulated many federal sex offenders by requiring them to avail themselves of existing state registration systems, and the criminal provisions for failure to register constituted "federal registration requirements."

As relevant here, Section 14072(i)(3) and (i)(4) penalized a covered federal sex offender—including respondent, see pp. 19-20, *supra*—for knowingly failing to register "in *any State* in which the person resides, is employed, carries on a vocation, or is a student." 42 U.S.C. 14072(i)(3) and (i)(4) (2006) (emphasis added). As Judge

Haynes explained in her dissent, "[w]hether a state was minimally compliant or not affected *where* [a federally convicted sex offender] was to register"—*i.e.*, with the FBI or with state authorities—"but not *whether* he had to register." App., *infra*, 70a n.7. Because respondent was a federally convicted sex offender whose offense had been designated as requiring registration, Section 14072(i)(3) and (i)(4) required him to register as a matter of federal law enforced via federal criminal penalties from the time he completed his military sentence. *Id.* at 65a-73a (Haynes, J., dissenting); accord *id.* at 42a-44a (Owen, J., concurring in the judgment).

To the extent the court of appeals believed that respondent was not subject to "federal registration requirements" (App., *infra*, 4a n.4) because he did not have to register directly with the federal government under pre-SORNA law, it was incorrect. And that view is especially incongruous given the court's view of SORNA as a fundamental transformation of respondent's relationship with the federal government. Even today sex offenders are required to register with the State, not the federal government, as a matter of federal law. Under SORNA, a sex offender is required to "register * * * in each jurisdiction where" he resides, is employed, or is a student. 42 U.S.C. 16913(a). And those registries are still operated by the States. Accordingly, the very aspect of pre-SORNA law that the court of appeals apparently deemed unique and dispositive (that respondent had to register with a State) is equally descriptive of post-SORNA law.

2. The court of appeals' threshold error about federal sex offenders' pre-SORNA registration obligations was the linchpin of its entire constitutional analysis. Once the fundamental legal predicate of the Fifth Circuit's

decision is corrected, it would be appropriate to remand this case to the court of appeals for further consideration. The court of appeals' erroneous construction of federal law shaped its entire analysis; had the court recognized that respondent was under a federal sex-offender registration obligation, it would not have had to reach and pronounce upon the constitutional issues that it perceived to be raised in this case. Sound principles of constitutional avoidance counsel against addressing such questions unnecessarily either in the Fifth Circuit or this Court. See *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (courts should not "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied") (internal quotation marks omitted). In light of those avoidance principles, an appropriate disposition of this case would be for this Court to correct the baseline statutory question that the Fifth Circuit erroneously resolved in a footnote and permit that court to revisit its analysis based on a proper understanding of the federal sex-offender-registration obligations applicable to respondent.

That course would be particularly prudent because no other court of appeals has addressed the constitutional questions that the en banc court debated, let alone considered them in light of this Court's recent decision in *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012) (*NFIB*). Indeed, relatively few federal prosecutions are likely to implicate the fact pattern that the Fifth Circuit thought it had before it—*i.e.*, federal sex offenders who were not under a registration obligation when their sentences concluded and who had not traveled in interstate commerce after the

enactment of SORNA and before failing to register or update their registration in violation of SORNA. See pp. 30-31, *infra*. If the Fifth Circuit were to reconsider its analysis in light of a corrected understanding of the statutory scheme before SORNA, it might obviate the need for this Court to address the constitutional questions altogether.

B. Even Assuming Respondent Was Not Subject To A Potential Federal Penalty Under Pre-SORNA Law, Congress Reasonably Exercised Its Article I Powers In Punishing His Failure To Register Under SORNA

Assuming arguendo that respondent was not, when he was released in 1999, already subject to a potential federal penalty if he failed to register as a sex offender, the court of appeals still erred in concluding that Congress lacks authority to criminalize respondent's failure to update his registration following an intrastate change of residence. Section 2250(a)(2)(A), as applied to a person convicted of a federal sex offense and unconditionally released from federal custody and supervision before SORNA's enactment, would be a proper exercise of Congress's Article I authority to enact necessary and proper measures to effectuate its military, commerce, and spending powers. See U.S. Const. Art. I, Sec. 8, Cls. 1, 3, 14, and 18; App., *infra*, 46a-61a (Dennis, J., dissenting).[8]

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[8] The government did not specifically invoke the Spending Clause as a source of congressional authority below, but a court may uphold Section 2250(a)(2)(A) as a necessary and proper exercise of Congress's Spending Clause power as part of its obligation "to afford congressional enactments the benefit of all reasonable arguments in favor of constitutionality." *United States* v. *Engler*, 806 F.2d 425, 433 (3d Cir. 1986), cert. denied, 481 U.S. 1019 (1987); see *Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993) ("A statute is presumed constitutional * * * and '[t]he burden is on the one attacking the legislative ar-

SORNA responded to dangerous gaps in then-existing sex-offender-registration laws. In the years leading up to SORNA's enactment, "the Nation had been shocked by cases in which children had been raped and murdered by persons who, unbeknownst to their neighbors or the police, were convicted sex offenders." *Carr*, 130 S. Ct. at 2249 (Alito, J., dissenting). By 2006, Congress perceived a need to strengthen the effectiveness of sex-offender registration and notification programs; to eliminate potential gaps and loopholes under the then-current laws; and to create a comprehensive national system to inform law enforcement and the public about sex offenders living in their communities. Given its "awareness that pre-[SORNA] registration law consisted of a patchwork of federal and 50 individual state registration systems," Congress sought "to make those systems more uniform and effective." *Reynolds*, 132 S. Ct. at 978.

SORNA comprises several components that work together to create a "comprehensive national system for the registration of [federal and state sex] offenders." 42 U.S.C. 16901. The statute "set[s] forth comprehensive registration-system standards" and it "make[s] federal funding contingent on States' bringing their systems into compliance with those standards." *Reynolds*, 132 S. Ct. at 978; see 42 U.S.C. 16913-16916, 16925(a) (2006 & Supp. IV 2010). It "requir[es] both state and federal

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rangement to negative every conceivable basis which might support it.'") (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)) (brackets in original). If a valid constitutional basis exists to sustain Section 2250(a)(2)(A) as applied to federal sex offenders released from federal custody and supervision before SORNA's enactment, it would make little sense to invalidate the statute in respondent's case based on an incomplete analysis.

sex offenders to register with relevant jurisdictions (and to keep registration information current)." *Reynolds*, 132 S. Ct. at 978; see 42 U.S.C. 16913(a)-(c), 16915(a), 16916. SORNA requires each participating jurisdiction to enact criminal penalties for a sex offender's failure to register or update a registration. 42 U.S.C. 16913(e). And it "creat[es] federal criminal sanctions applicable to those who violate the Act's registration requirements." *Reynolds*, 132 S. Ct. at 978; see 18 U.S.C. 2250(a). Section 2250(a)(2)(A), which makes it a crime for a sex offender convicted under federal law to knowingly fail to register or update a registration, is a "necessary part of the comprehensive national system of SORNA that Congress enacted." App., *infra*, 57a (Dennis, J., dissenting).

As this Court explained in *Carr*, "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." 130 S. Ct. at 2238. The federal government's relationship with sex offenders "over whom the Federal Government has a direct supervisory interest," *id.* at 2239, creates interests and responsibilities that would not exist if those individuals had not previously come into federal custody. See *United States* v. *Comstock*, 130 S. Ct. 1949, 1961 (2010) (upholding, under the Necessary and Proper Clause, a federal statute that provides for federal civil commitment of sexually dangerous persons beyond their otherwise-applicable term of federal custody). And those interests and responsibilities do not terminate automatically when the individual is released from prison or federal supervision. Cf. *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts,

C.J.) (recognizing that "preexisting activity" can bring individuals "within the sphere of federal regulation").[9]

Section 2250(a)(2)(A) also makes state registration systems more effective by enforcing the registration requirements imposed on federal sex offenders who enter state jurisdictions. SORNA's regulatory scheme is in part supported by Congress's spending authority, and requiring federal offenders to register (and update their registration) improves the effectiveness of that scheme by addressing the dangers posed by the presence of sex offenders in the community. Cf. *Sabri* v. *United States*, 541 U.S. 600 (2004) (Congress validly criminalized corrupt conduct that could threaten federally supported programs). And the federal government has a particular interest in enforcing (in conjunction with the States) SORNA's uniform registration requirements for those who entered the system on the basis of a federal conviction, even when they have not engaged in interstate travel. See App., *infra*, 56a (Dennis, J., dissenting) ("[I]t is reasonable for Congress to require the federal government, rather than the participating jurisdictions, to be primarily responsible for monitoring and enforcing [the] registration and updating requirements under SORNA" for "federal sex offenders" who are "identified

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[9] The court of appeals relied (App., *infra*, 16a n.28) on the Solicitor General's statement at oral argument in *Comstock* that "the Federal Government would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed." *Comstock*, 130 S. Ct. at 1965. That reliance was misplaced. The statement related to "the power to commit," and not to lesser regulatory measures imposed on released offenders for registration and notification purposes. See U.S. Br. at 5 n.2, *Comstock*, *supra* (No. 08-1224) (noting that the case concerned only civil commitment and did not implicate other provisions of the statute, including the registration provisions at issue here).

and classified as such by virtue of their federal convictions").

Here, Congress reasonably concluded that Section 2250(a)(2)(A) was "'convenient, or useful' or 'conducive' to the 'beneficial exercise'" of its legislative power, *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.) (quoting *Comstock*, 130 S. Ct. at 1965), and that it was "rationally adapted to the attainment of a legitimate end—a national comprehensive system for registering, updating, and tracking sex offenders—under the commerce power, the spending power, or under other powers that the Constitution grants Congress the authority to implement." App., *infra*, 59a (Dennis, J., dissenting).

C. The Court Of Appeals' Invalidation Of A Portion Of An Important Act Of Congress Warrants This Court's Review

This Court should grant review because the court of appeals invalidated certain applications of an important Act of Congress. See App., *infra*, 3a ("The federal requirement that sex offenders register their address is unconstitutional on narrow grounds."). This Court has often reviewed lower-court decisions holding that a federal law is unconstitutional, even in the absence of a circuit split. See, *e.g.*, *United States* v. *Alvarez*, 132 S. Ct. 2537, 2542 (2012) (noting that circuit conflict arose "[a]fter certiorari was granted"); *Comstock*, 130 S. Ct. at 1956 (same); *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *United States* v. *Stevens*, 130 S. Ct. 1577 (2010); *United States* v. *Williams*, 553 U.S. 285 (2008); *Gonzales* v. *Carhart*, 550 U.S. 124 (2007); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004); *United States* v. *Morrison*, 529 U.S. 598 (2000); *NEA* v. *Finley*, 524 U.S. 569 (1998); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995). That practice is consistent with the Court's

recognition that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.)).

Although the decision in this case is the first from a court of appeals to address the constitutionality of Section 2250(a)(2)(A) as applied to "former" federal sex offenders, the issue will recur.[10] Indeed, the same question is currently pending before the Second Circuit, which recently received supplemental letter briefs from the parties about the effects of the Fifth Circuit's decision in this case and this Court's decision in *NFIB* on the constitutionality of Section 2250(a)(2)(A) as applied to a defendant who had been convicted of a sex offense under the Uniform Code of Military Justice and discharged from the military and released from federal custody before SORNA was enacted. See Docs. 59, 60, 71, 77, *United States* v. *Brunner*, No. 11-2115 (2d Cir. filed July 26, Aug. 27, and Sept. 17, 2012).

This Court's review is particularly appropriate because Section 2250 is a centerpiece of the "more uniform and effective" sex-offender-registration system that SORNA aspired to create. *Reynolds*, 132 S. Ct. at 978. As the Court explained in *Reynolds*, key aspects of SORNA's reforms included "requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current)" and "creating federal criminal sanctions applicable to those who violate the Act's registration requirements." *Ibid.*; see also *Carr*, 130 S. Ct. at 2240 (explaining that "Sec-

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[10] The Tenth Circuit rejected a facial challenge to Section 2250(a)(2)(A) in *United States* v. *Yelloweagle*, 643 F.3d 1275 (2011), cert. denied, 132 S. Ct. 1969 (2012).

tion 2250 * * * is embedded in a broader statutory scheme enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks"). In creating those federal criminal sanctions (*i.e.*, Section 2250), Congress acted "entirely reasonabl[y]" in choosing to "assign[] the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders." *Id.* at 2238. The decision below, however, threatens that special role and the national uniformity and effectiveness that SORNA was intended to achieve.

To be sure, the court of appeals repeatedly noted the limited extent of its holding. It explained that the grounds of its decision are "narrow," App., *infra*, 3a, and that they would affect the constitutionality of only some applications of Section 2250(a)(2)(A). Its reasoning does not, for instance, affect prosecutions against "(1) any federal sex offender who was in prison or on supervised release when [SORNA] was enacted in 2006 or (2) any federal sex offender convicted since then." *Id.* at 4a. Moreover, even within the category of "former" federal sex offenders, the court of appeals' reasoning does not prevent the government from prosecuting a failure to register under Section 2250(a)(2)(B) when it is able to establish that those offenders traveled in interstate commerce after SORNA's effective date. *Id.* at 4a-5a & n.3, 42a. The Department of Justice and the Sentencing Commission do not maintain statistics that would indicate what proportion of prosecutions under Section 2250(a) have been predicated on Section 2250(a)(2)(A) rather than Section 2250(a)(2)(B). It does, however, appear that cases involving allegations of interstate travel have composed the great majority of Section 2250 prosecutions that the government has brought. And some

prosecutions against persons with federal-sex-offense convictions did in fact involve interstate travel that could have been charged under Section 2250(a)(2)(B). See, *e.g.*, Gov't C.A. Br. at 4-6, *United States* v. *Brunner*, No. 10-2115 (2d Cir.) (explaining that the defendant had registered as a sex offender while living in New York and then later resided in both Tennessee and New York); *United States* v. *Yelloweagle*, 643 F.3d 1275, 1278 n.1 (10th Cir. 2011) (noting that the defendant "traveled from Colorado to Oklahoma"), cert. denied, 132 S. Ct. 1969 (2012).

Notwithstanding the potentially limited practical effect of the court of appeals' reasoning, this Court's review of that decision is appropriate because an important federal statute has erroneously been found to be unconstitutional in some of its applications. And the court of appeals based its constitutional reasoning on a flawed understanding of the registration obligations of federal sex offenders like respondent. Correction of the statutory reasoning of the court below and, if necessary, review of its constitutional holding is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2012

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-51185

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY JAMES KEBODEAUX, ALSO KNOWN AS
ANTHONY KEBODEAUX, DEFENDANT-APPELLANT

July 6, 2012

Appeal from the United States District Court for the
Western District of Texas

Before: JONES, Chief Judge, and KING, JOLLY, DAVIS, SMITH, GARZA, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES and GRAVES, Circuit Judges.*

JERRY E. SMITH, Circuit Judge:

Anthony Kebodeaux, a federal sex offender, was convicted, under the Sex Offender Registration and Notification Act ("SORNA"), of failing to update his change of address when he moved intrastate. A panel of this court affirmed. *United States v. Kebodeaux*, 647 F.3d 137 (5th

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* Judge Higginson was not a member of the court when this case was submitted to the court en banc and did not participate in this decision.

Cir. 2011). The panel majority rejected Kebodeaux's argument that Congress does not have the power to criminalize his failure to register because it cannot constitutionally reassert jurisdiction over his intrastate activities after his unconditional release from federal custody. Judge Dennis concurred in the judgment and assigned lengthy reasons, urging that SORNA is authorized by the Commerce Clause. The panel opinion was vacated by our decision to rehear the case en banc. *United States v. Kebodeaux*, 647 F.3d 605 (5th Cir. 2011). Because we agree with Kebodeaux that, under the specific and limited facts of this case, his commission of a federal crime is an insufficient basis for Congress to assert unending criminal authority over him, we reverse and render a judgment of dismissal.

I.

While in the military, Kebodeaux had consensual sex with a fifteen-year-old when he was twenty-one and was sentenced in 1999 to three months in prison. He fully served that sentence, and the federal government severed all ties with him. He was no longer in federal custody, in the military, under any sort of supervised release or parole, or in any other special relationship with the federal government when Congress enacted a statute that, as interpreted by the Attorney General, required Kebodeaux to register as a sex offender.[1] When

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[1] *See* 42 U.S.C. § 16913 (2006) (requiring a sex offender to register in each jurisdiction in which he resides and to update that registration); 28 C.F.R. § 72.3 (2007) (specifying that § 16913's requirements apply to all sex offenders, "including sex offenders convicted of the offense for which registration is required prior to the enactment of [§ 16913]"). Because Kebodeaux committed his offense before SORNA's passage, his duty to register comes from the Attorney General's regulation rather than the statute itself. *Reynolds v. United*

he failed to update his state registration within three days of moving from San Antonio to El Paso, he was convicted under 18 U.S.C. § 2250(a) (also enacted in 2006) and sentenced to a year and a day in prison.

Kebodeaux argues that § 2250(a)(2)(A) and the registration requirements that it enforces are unconstitutional as applied to him, because they exceed the constitutional powers of the United States. He is correct: Absent some jurisdictional hook not present here, Congress has no Article I power to require a former federal sex offender to register an intrastate change of address after he has served his sentence and has already been unconditionally released from prison and the military.[2]

The federal requirement that sex offenders register their address is unconstitutional on narrow grounds. We do not call into question Congress's ability to impose conditions on a prisoner's release from custody, including requirements that sex offenders register intrastate

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States, — U.S. —, 132 S. Ct. 975, 984, 181 L. Ed. 2d 935 (2012). Despite the fact that the Attorney General did not follow the procedures laid out in the Administrative Procedure Act when issuing the regulation, we found that to be harmless error as applied to a defendant who had moved interstate but was otherwise in substantially the same situation as is Kebodeaux. *United States v. Johnson*, 632 F.3d 912, 931-32 (5th Cir.), *cert. denied*, — U.S. —, 132 S. Ct. 135, 181 L. Ed. 2d 55 (2011). Although the rule may be valid as applied to a sex offender who moves interstate, the portion of the statute that gives the Attorney General the authority to apply SORNA to pre-act offenders who move intrastate would not be valid if Congress does not have the power under Article I to apply the statute to pre-act sex offenders. Therefore, our analysis focuses on whether Congress had that authority that it attempted to grant to the Attorney General.

[2] *Cf.* 18 U.S.C. § 2250(a)(2)(B) (criminalizing state sex offenders' failure to register or update registration *if they travel in interstate commerce*).

changes of address after release. *After* the federal government has *unconditionally* let a person free, however, the fact that he once committed a crime is not a jurisdictional basis for subsequent regulation and possible criminal prosecution. Some other jurisdictional ground, such as interstate travel, is required.[3]

This finding of unconstitutionality therefore does not affect the registration requirements for (1) any federal sex offender who was in prison or on supervised release when the statute was enacted in 2006 or (2) any federal sex offender convicted since then. Instead, it applies only to those federal sex offenders whom the government deemed capable of being unconditionally released from its jurisdiction before SORNA's passage in 2006.[4] More-

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[3] Thus, even with respect to past federal sex offenders such as Kebodeaux, Congress presumably could remedy the constitutional problem merely by adding an element of interstate travel to the crime of failing to register. Because it is not before us, however, we make no ruling on that speculative issue.

[4] In her well-written dissent, Judge Haynes disputes that the federal government unconditionally released Kebodeaux from its jurisdiction upon his release from custody. Citing the Wetterling Act of 1994, as amended by the Lychner Act of 1996, 42 U.S.C. §§ 14071-14073, *repealed by* SORNA Pub. L. No. 109-248, § 129, 120 Stat. 587, 600 (2006), the dissent argues that Kebodeaux has been subject to federal registration ever since his 1999 conviction. But that notion overlooks a fundamental difference between SORNA and its predecessors.

Although SORNA directly imposes a registration requirement on covered sex offenders, *see* § 16913(a), pre-SORNA federal law merely conditioned federal funding on states' maintaining their own sex-offender registries that were compliant with federal guidelines, *see* § 14071(g) (2000) (repealed by SORNA). Only sex offenders residing in non-compliant states were subject to federal registration for intrastate changes in residence. *See* § 14072(g)(1)-(3), (i) (2000) (repealed by SORNA).

over, even as to those sex offenders, it means only that Congress could treat them exactly as all state sex offenders already are treated under federal law. It also has no impact on state regulation of sex offenders.

II.

SORNA says, in relevant part, that "[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student."[5] Those requirements are made applicable to former federal sex offenders via 42 U.S.C. § 16913(d) and 28 C.F.R. § 72.3.[6] SORNA then includes the following criminal provision:

Because his state of residence, Texas, was compliant with federal guidelines at the time of his offense, Kebodeaux was not subject to federal registration requirements. *See Creekmore v. Attorney Gen. of Tex.*, 341 F. Supp. 2d 648, 654 (E.D. Tex. 2004) (observing that Texas enacted its registry in 1991 and amended it "four times: in 1993, 1995, 1997, and 1999 to ensure that the program met minimum federal requirements" (citations omitted)); *Creekmore v. Attorney Gen. of Tex.*, 116 F. Supp. 2d 767, 773 (E.D. Tex. 2000) (noting that Texas's registration program was "federally-approved"); Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 6 (2008) (observing that all fifty states and the District of Columbia had complied with the Wetterling Act by the end of 1996). Thus, before the passage of SORNA, Kebodeaux was subject only to state, not federal, registration obligations.

[5] 42 U.S.C. § 16913(a). In addition, "[f]or initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence." *Id.* A registration must be updated within three days of any change. § 16913(c).

[6] *See* § 16913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to

> Whoever—
>
> (1) is required to register under [SORNA];
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> (2)(A) is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law . . . ; or
>
> (B) travels in interstate or foreign commerce . . . ; and
>
> (3) knowingly fails to register or update a registration as required by [SORNA];
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250(a). Kebodeaux argues that Congress has no authority under Article I to subject him to conviction pursuant to § 2250(a)(2)(A). The government, on the other hand, maintains that its power to criminalize the conduct for which Kebodeaux was originally convicted includes the authority to regulate his movement even after his sentence has expired and he has been unconditionally released.

The most analogous Supreme Court decision is *United States v. Comstock*, — U.S. —, 130 S. Ct. 1949, 1954, 176 L. Ed. 2d 878 (2010), in which the Court examined whether Congress has the Article I power to enact a civil-commitment statute that authorizes the Department of Justice to detain mentally ill, sexually dangerous federal prisoners beyond when they would otherwise be released. The Court upheld that statute on narrow

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sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offenders. . . . "); 28 C.F.R. § 72.3 (specifying that § 16913's requirements apply to all sex offenders, "including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act").

grounds because of "five considerations, taken together." *Id.* at 1956, 1965.

Kebodeaux's facts go beyond those in *Comstock*, however, because this case is not merely about whether Congress can regulate the activity of someone still in federal custody past the expiry of his sentence. Importantly, it raises the further question whether Congress can regulate his activity *solely* because he was once convicted of a federal crime. The "considerations" that the Court found important in *Comstock* are not expansive enough to subject Kebodeaux to federal criminal sanctions under the unusual circumstances that he presents.

A.

First, the *Comstock* Court explained, and the panel majority here stressed, that Congress has broad authority to enact legislation under the Necessary and Proper Clause. *Id.* at 1956. Thus, to be constitutional under that clause, a statute must constitute a means that is "rationally related"[7] or "reasonably adapted"[8] to an enumerated power. Congress has "a large discretion" as to the choice of means, *id.* at 1957 (quoting *Lottery Case*, 188 U.S. 321, 355, 23 S. Ct. 321, 47 L. Ed. 492 (1903)), and we apply a "presumption of constitutionality" to its enactments, *id.* (quoting *United States v. Morrison*, 529

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[7] *Comstock*, 130 S. Ct. at 1956-57 (citing *Gonzales v. Raich*, 545 U.S. 1, 22, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005); *Sabri v. United States*, 541 U.S. 600, 605, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004); *United States v. Lopez*, 514 U.S. 549, 557, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995); *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981)).

[8] *Comstock*, 130 S. Ct. at 1957 (quoting *Raich*, 545 U.S. at 37, 125 S. Ct. 2195) (Scalia, J., concurring in the judgment); *United States v. Darby*, 312 U.S. 100, 121, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

U.S. 598, 607, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000)). This first factor is not fact-specific; it suggests that the analysis always starts with a heavy thumb on the scale in favor of upholding government action.[9]

We must take care not to misunderstand the use of the words "rationally related" as implying that the Necessary and Proper Clause test is akin to rational-basis scrutiny under the Due Process and Equal Protection Clauses.[10] That would mean that federal action would be upheld so long as there is merely a conceivable rational relationship between an enumerated power and the action in question.[11] But that would be inconsistent with both the Court's Commerce Clause jurispru-

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[9] Although the panel majority was correct that there is a presumption of constitutionality, it is troubling that it engaged in an extended discussion of all the *different* constitutional challenges against which SORNA has been upheld, as though those instances somehow make it more likely that *Kebodeaux's* constitutional challenge fails. That courts have upheld the five-year-old statute against an *ex post facto* challenge, a due process challenge, a non-delegation challenge, and a Commerce Clause challenge to a clause that explicitly is limited to persons traveling in interstate commerce does not suggest that we must uphold *this* SORNA provision against *this* challenge.

[10] *See Comstock*, 130 S. Ct. at 1966 (Kennedy, J., concurring in the judgment) ("This Court has not held that the [*Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88, 75 S. Ct. 461, 99 L. Ed. 563 (1955),] test, asking if 'it might be thought that the particular legislative measure was a rational way to correct' an evil, is the proper test in this context. . . . Indeed, the cases the Court cites in the portion of its opinion referring to 'rational basis' are predominantly Commerce Clause cases, and none are due process cases.").

[11] *See id.* (Kennedy, J., concurring in the judgment) (explaining that rational-basis scrutiny under the Due Process Clause requires asking whether "'it might be thought that the particular legislative measure was a rational way to correct' an evil" (quoting *Lee Optical*, 348 U.S. at 487-88, 75 S. Ct. 461)).

dence[12] and *Comstock*, which held that 18 U.S.C. § 4248 is constitutional because of "five considerations, taken together," only one of which involves "the sound reasons for the statute's enactment in light of the Government's [legitimate interest]."[13] Thus, unless this court were to hold that the other "considerations" in *Comstock* were entirely superfluous, it follows that, although our analysis begins with great deference to constitutionality, we should not confuse it with Due Process Clause rational-basis scrutiny.

B.

The second factor in *Comstock*, 130 S. Ct. at 1958, is that the civil-commitment statute at issue was but "a modest addition to a set of federal prison-related

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[12] *See id.* at 1967 (Kennedy, J., concurring in the judgment) ("[The Court's Commerce Clause] precedents require a tangible link to commerce, not a mere conceivable rational relation, as in *Lee Optical*."). For example, in *Morrison* the Court struck down a civil remedy for violence against women under the Commerce Clause despite copious evidence that such violence had a substantial effect on (and thus was conceivably rationally related to) interstate commerce. *See Morrison*, 529 U.S. at 615, 120 S. Ct. 1740 (finding statute unconstitutional because, "[i]f accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption"); *id.* at 628-29, 120 S. Ct. 1740 (Souter, J., dissenting) (discussing the "mountain of data assembled by Congress . . . showing the effects of violence against women on interstate commerce"). So, plainly, more is required.

[13] *Comstock*, 130 S. Ct. at 1965. For example, the *Comstock* Court also relied on the fact that the statute was "narrowly tailored" or "narrow [in] scope," *id.*, an analysis that is not necessary to uphold a law under rational-basis scrutiny under the Due Process or Equal Protection Clause, *see, e.g.*, *Lee Optical*, 348 U.S. at 487-88, 75 S. Ct. 461.

mental-health statutes that have existed for many decades." Although "even a longstanding history of related federal action does not demonstrate a statute's constitutionality," *id.* (citing *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 678, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970)), it expands the deference afforded to a statute.[14] Conversely, the absence of an historical analog reduces that deference.[15]

SORNA's sex-offender-registration requirements have a short history: They have existed only since 2006, and federal law relating to sex-offender registration only since 1994.[16] The government admits that federal sex-offender registration laws are of "relatively recent vintage" but urges that they should be analogized to

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[14] *Cf. Walz*, 397 U.S. at 678, 90 S. Ct. 1409 ("'If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it. . . .'" (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31, 43 S. Ct. 9, 67 L. Ed. 107 (1922))).

[15] *Va. Office for Prot. & Advocacy v. Stewart*, — U.S. —, 131 S. Ct. 1632, 1641, 179 L. Ed. 2d 675 (2011) ("Respondents rightly observe that federal courts have not often encountered lawsuits brought by state agencies against other state officials. That does give us pause. Lack of historical precedent can indicate a constitutional infirmity . . . " (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, — U.S. —, 130 S. Ct. 3138, 3159, 177 L. Ed. 2d 706 (2010))); *Free Enter. Fund*, 130 S. Ct. at 3159 ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity" (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting))).

[16] *See Carr v. United States*, — U.S. —, 130 S. Ct. 2229, 2232, 176 L. Ed. 2d 1152 (2010); Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 29-36 (2008) (discussing history of federal sex-offender-registration laws).

probation or supervised-release laws, which have a longer pedigree.

There is, however, a big difference between SORNA's sex-offender-registration requirements and probation or supervised release—a distinction that goes to the heart of this case. Unlike the situation involving probation or supervised release, SORNA's sex-offender-registration requirements (and § 2250(a)(2)(A)'s penalties) were not a condition of Kebodeaux's release from prison, let alone a punishment for his crime.[17]

The Department of Justice cannot find a single authority, from more than two hundred years of precedent, for the proposition that it can reassert jurisdiction over someone it had long ago unconditionally released from custody just because he once committed a federal crime. Thus, SORNA's registration requirements for federal sex offenders are constitutionally novel, as the panel majority conceded. This factor weighs against the government.

C.

This brings us to the third factor. That inquiry is whether Congress reasonably extended its well-established laws by applying sex-offender-registration

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[17] Every circuit, including ours, has held that, unlike probation or supervised release, SORNA's registration requirements are civil regulations whose purpose is not to punish for crimes. *See United States v. Young*, 585 F.3d 199, 204 (5th Cir. 2009) (per curiam); *cf. Smith v. Doe*, 538 U.S. 84, 101-02, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (upholding Alaska's sex-offender-registration statute against *ex post facto* challenge and distinguishing it from probation and supervised release because it is not a punishment).

requirements to someone long free from federal custody or supervision.[18]

1.

The government argues, and the panel majority held, that the statute is reasonably adapted to Congress's military powers. For that proposition, they again rely on the analogy between sex-offender-registration requirements, on the one hand, and supervised release and probation, on the other: Because the latter are constitutional, the former must be too, or so the argument goes.

But that theory obscures two crucial distinctions: First, as we have mentioned, SORNA's registration requirements, unlike probation and supervised release, are not a means to punish a sex offender for committing his crime[19] but instead are merely civil regulations.[20] Indeed, they cannot serve any punitive purpose in the case of Kebodeaux, because SORNA was enacted long after he committed his crime. If SORNA's registration requirements were—like probation and super-

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[18] *See Comstock*, 130 S. Ct. at 1961 (explaining that the third factor is that "Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence").

[19] *See id.* at 1979 n.12 (Thomas, J., dissenting) (referring to supervised release as a "form of punishment"); *United States v. Knights*, 534 U.S. 112, 119, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) ("Probation, like incarceration, is a 'form of criminal sanction. . . .'" (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987))).

[20] *See Young*, 585 F.3d at 204; *see also Smith*, 538 U.S. at 101, 123 S. Ct. 1140 (explaining why Alaska's sex-offender-registration requirements are not, like probation and supervised release, forms of punishment).

vised release—criminal punishments, they would violate the *Ex Post Facto* Clause.[21] But because SORNA's registration requirements are civil and were enacted after Kebodeaux committed his crime, the government cannot justify their constitutionality on the ground that they merely punish Kebodeaux for the crime he committed while in the military.[22]

Secondly, unlike SORNA's registration requirements, probation and supervised release are conditions of release from (or instead of) custody.[23] Like the civil

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[21] *Young*, 585 F.3d at 204; *see also United States v. Caulfield*, 634 F.3d 281, 283 (5th Cir. 2011) ("The heart of the *Ex Post Facto* Clause bars application of a law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." (quoting *Johnson v. United States*, 529 U.S. 694, 699, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000))).

[22] The panel majority inaccurately asserted that Kebodeaux conflates his Article I argument with an Ex-Post-Facto-Clause argument. In fact, his Article I contention works only *because* § 2250(a)(2)(A) is not an *ex post facto* criminal punishment. Because SORNA's registration requirements are *not* criminal punishments, but a civil regulatory scheme, they do not pose an *ex post facto* problem. But for that very reason—that SORNA registration is a civil regulatory scheme and not a punishment imposed on Kebodeaux for his federal crime—Congress needs some other jurisdictional hook to apply the requirement to persons such as him.

[23] *Compare* 18 U.S.C. § 2250(a)(2)(A) (criminalizing the failure to register or update registration as a sex offender regardless of the date of the crime) *and* 28 C.F.R. § 72.3 (specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act") *with* 18 U.S.C. § 3603(1) (tying the duties of the probation officer to "the conditions specified by the sentencing court"), § 3601 (same), § 3563(a) (explaining the "condition[s] of a sentence of probation"), § 3583(d) (same for supervised release), *and United States v. Johnson*, 529 U.S. 53, 56, 120 S. Ct.

confinement statute at issue in *Comstock*, they are thus "reasonably adapted . . . to Congress' power to act as a responsible federal custodian" of its prisoners, because they "avert the public danger likely to ensue from the release of . . . detainees." *Comstock*, 130 S. Ct. at 1961 (internal quotation marks and citations omitted). By contrast, although § 2250(a) is surely meant to "avert . . . public danger," it is not, at least in cases such as Kebodeaux's, from "the *release* of . . . detainees,"[24] because it applies even to those who have long severed all ties with the criminal justice system. It therefore makes no sense to say that SORNA's registration requirements are—like probation, supervised release, or the civil commitment of mentally ill prisoners—"reasonably adapted" to the government's role as "custodian . . . of its *prison system*."[25]

The tenuousness of the government's position can be shown just by listing the chain of causation from Congress's military power to its criminalization of Kebodeaux's failure to register a change of address: Congress can supervise military personnel, so it can establish crimes for them, so it can prosecute and convict them, so it can supervise them for the duration of their

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1114, 146 L. Ed. 2d 39 (2000) ("A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court." (quoting 18 U.S.C. § 3624(e))).

[24] *Comstock*, 130 S. Ct. at 1961 (citation omitted) (emphasis added).

[25] *Id.* at 1965 (emphasis added) (holding that "§ 4248 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system").

sentence and while they are in federal custody, *so it can pass a law to protect society from someone who was once in prison but seven years ago had fully served his sentence and has not since been in contact with the federal government.* That last power is not reasonably adapted to Congress's ability to regulate the *military*.

2.

The government, like the panel majority, responds by seizing on language in *Comstock* that says that the power to imprison violators of federal law includes "the additional power to regulate the prisoners' behavior *even after their release.*" *Id.* at 1964 (emphasis added). But the government and the majority quote the Court too selectively by omitting the beginning of the sentence. What *Comstock* actually says is, "Indeed even the dissent acknowledges that Congress has . . . the additional power to regulate the prisoners' behavior even after their release." *Id.* The Court was merely enumerating those government actions that even the *Comstock* dissent conceded were constitutional.[26] And the portions of the dissent cited by the majority assert only that

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[26] *See id.* at 1964 ("Indeed even the dissent acknowledges that Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, and also the additional power to imprison people who violate those (inferentially authorized) laws, and the additional power to provide for the safe and reasonable management of those prisons, and the additional power to regulate the prisoners' behavior even after their release" (citing *id.* at 1976-77, 1978 n.11 (Thomas, J., dissenting)). The majority opinion cites op. p. 1979, n.11 of the dissent, but it must have meant note 12, because note 11 does not appear on page 17 (although note 12 does), and note 11 has nothing to do with regulation after release (e.g. in the form of supervised release), whereas that is precisely what is discussed in note 12.

Congress has the power to regulate a prisoner's behavior post-release as part of his *sentence;* the dissent specifically rejects the notion that the government has open-ended authority to regulate him after his punishment has ended merely by virtue of some sort of vague "special relationship" between the federal government and one who once committed a federal crime.[27]

The *Comstock* majority distanced itself from the notion that the panel majority endorsed here. The Court cabined its holding by noting that the Solicitor General had conceded that the government could not commit a person who had already been released from federal custody or sent to state custody;[28] only if he was *still in* federal custody could the government commit

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[27] *See id.* at 1979 n.12 (Thomas, J., dissenting) ("Contrary to the Government's suggestion, federal authority to exercise control over individuals serving terms of 'supervised release' *does not derive from the Government's 'relationship' with the prisoner,* . . . but from the original criminal sentence itself." (citations omitted) (emphasis added)); *id.* at 1976-77 (Thomas, J., dissenting) (concluding that "[f]ederal laws that criminalize conduct that interferes with enumerated powers, establish prisons for those who engage in that conduct, and set rules for the care and treatment of prisoners awaiting trial or *serving a criminal sentence*" are constitutional (emphasis added)); *id.* at 1979 (Thomas, J., dissenting) ("Once the Federal Government's criminal jurisdiction over a prisoner ends, so does any 'special relationship' between the government and the former prisoner." (alteration omitted)).

[28] *See id.* at 1963 ("[T]he Solicitor General acknowledges that 'the Federal Government would have no appropriate role' with respect to an individual covered by the statute once 'the transfer to State responsibility and State control has occurred.'" (citation omitted)); *id.* at 1965 (noting that the Solicitor General conceded that "the Federal Government would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed").

him.[29] But if the power to regulate a person stems merely from the fact that he was once convicted of a federal crime, then whether he is presently in federal prison or subject to federal supervision would make no difference: Once he has been convicted of a federal crime, the government's authority over him to protect society would continue as long as he lives.

Thus, in the instant case the government is reneging on precisely those concessions that caused the Court to reason that the civil commitment statute at issue in *Comstock* was "narrowly tailored . . . [to] pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system." *Id.* at 1965. And the panel majority endorsed the government's about-face.

3.

The other case on which the panel majority relied is *Carr*, which it cited for the startling proposition that § 2250(a)(2)(A) is constitutional because the federal government has a "direct supervisory interest" over anyone who once committed a federal sex offense. It is true that *Carr* stated, 130 S. Ct. at 2239, that "the Federal Government has a direct supervisory interest" over federal sex offenders. But, as the panel majority acknowledged, *Carr* did not address the extent of Congress's Article I power at all—it involved a statutory-interpretation issue and an Ex-Post-Facto-Clause question that the Court

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[29] *See id.* at 1964-65 (quoting the Solicitor General for the proposition that "[federal authority for § 4248] has always depended on the fact of Federal custody, on the fact that this person has entered the criminal justice system . . . ").

avoided.[30] Moreover, the briefs in that case show that no one—neither parties nor *amici curiae*—raised the argument that Kebodeaux brings here.[31] Thus, the panel took an isolated statement from *Carr* out of context to make it a constitutional principle with far-reaching implications about the scope of federal power.

The panel majority was correct that § 2250(a)(2)(A) applies to individuals over whom the federal government has a "direct supervisory interest" because they are in custody or have been released from custody on the condition that they comply with SORNA.[32] But that section *also* applies, as relevant here, to those who have long been free of federal custody and supervision after fully serving their sentences. To say that Congress continues to have a "direct supervisory interest" over such persons—like Kebodeaux—is to announce that it has an eternal supervisory interest over anyone who ever committed a federal sex crime. And *that* is no different from saying that Congress has such an interest over anyone who ever committed *any* federal crime, because there is

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[30] *See Carr*, 130 S. Ct. at 2232-33 ("At issue in this case is whether § 2250 applies to sex offenders whose interstate travel occurred prior to SORNA's effective date and, if so, whether the statute runs afoul of the Constitution's prohibition on *ex post facto* laws.").

[31] A Commerce Clause argument related to applying the statute to pre-SORNA travel (i.e., not the issue Kebodeaux raises) was made by *amicus* but not addressed by the Court in light of its holding. *See id.* at 2248 (Alito, J., joined by Thomas, J., and Ginsburg, J., dissenting) (noting that "[i]t can also be argued that a broader construction would mean that Congress exceeded its authority under the Commerce Clause," but not addressing that argument (citing Brief for the National Association of Criminal Defense Lawyers as *Amicus Curiae* 16-17)).

[32] *See* 18 U.S.C. § 3583(d) (making compliance with SORNA "an explicit condition" of a sex offender's supervised release).

nothing that is constitutionally special about sex crimes.[33]

4.

In sum, as applied to Kebodeaux, SORNA's registration requirements are not, and cannot be, an attempt to punish the initial crime or to act as a responsible custodian of prisoners; they are merely an effort to protect the public from those who may be dangerous because they once were convicted of a sex offense. By that logic, Congress would have never-ending jurisdiction to regu-

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[33] Similarly, the law concerning Congress's military powers suggests that Congress does not have continuing military jurisdiction over Kebodeaux after he was discharged from the military. Except in very limited situations, a discharged person is no longer subject to the Uniform Code of Military Justice. *See* 10 U.S.C. § 803. In *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13, 22-23, 76 S. Ct. 1, 100 L. Ed. 8 (1955), the Court held that the Necessary and Proper Clause does not give the federal government power to try an ex-military serviceman by court-martial five months after he left the military for a crime committed while in the military. Because he had left the military, he had the same Article III protections as did any ordinary civilian.

If anything, the link between the military power and the federal government's action is even more attenuated in this case than in *Toth*, because the court-martial in *Toth* served the purpose of punishing someone for his illegal conduct *while in the military*, *see id.* at 13, 76 S. Ct. 1, whereas here the sex-offender-registration requirements serve no such purpose. As discussed, SORNA's purpose is merely to reduce the risk to society posed by one who has committed certain crimes. *See* 42 U.S.C. § 16901 (stating that SORNA's purpose is to "protect the public from sex offenders and offenders against children"). Indeed, the government does not argue that it still has military jurisdiction over Kebodeaux, but only that its power to criminalize his predicate crime includes the power to regulate his present-day conduct.

late anyone who was ever convicted of a federal crime of any sort, no matter how long ago he served his sentence, because he may pose a risk of re-offending.

Indeed, that logic could easily be extended beyond federal crimes: Congress could regulate a person who once engaged in interstate commerce (and was thereby subject to federal jurisdiction) on the ground that he now poses a risk of engaging in interstate commerce again. In short, the only "rational relation" between § 2250(a)(2)(A)'s application to Kebodeaux and an enumerated federal power is that Kebodeaux was *once* subject to federal jurisdiction—reasoning that is so expansive that it would put an end to meaningful limits on federal power. The third *Comstock* "consideration" thus favors Kebodeaux.

D.

The fourth "consideration" is whether "the statute properly accounts for state interests." *Comstock*, 130 S. Ct. at 1962. "[T]he 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S. at 561 n.3, 115 S. Ct. 1624 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)). Thus, "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Id.* (quoting *United States v. Enmons*, 410 U.S. 396, 411-12, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973)). Alternatively, it "displace[s] state policy choices . . . [when] its prohibitions apply even in States that have chosen not to outlaw the conduct in question." *Id.* (citation omitted).

As the government points out, some aspects of SORNA do accommodate state interests. A state for-

goes only ten percent of its federal funding by failing substantially to comply with SORNA (for example, by failing to maintain a registry). *See* 42 U.S.C. § 16925(a). And § 2250 itself allows an affirmative defense if "uncontrollable circumstances"—which, according to the government, would include a state's failure to collect registration data—prevent an individual from complying with its registration requirements. 18 U.S.C. § 2250(b). Indeed, as the panel pointed out, this court recently upheld SORNA against a Tenth-Amendment challenge on the ground that the statute does not require the states to comply with it. *United States v. Johnson*, 632 F.3d 912, 920 (5th Cir.), *cert. denied*, — U.S. —, 132 S. Ct. 135, 181 L. Ed. 2d 55 (2011).

Nevertheless, the degree of state accommodation with respect to § 2250(a)(2)(A) is substantially less than that present in *Comstock*, 130 S. Ct. at 1962-63, in which the Court found that Congress's statutory scheme for civilly confining mentally ill and sexually dangerous prisoners accommodated state interests because the Attorney General was required to notify interested states about the confinement and to *release prisoners* if a state wished to assert authority over them. Thus, continued federal confinement was, in essence, continually subject to the states' veto.

Here, by contrast, there is no provision by which someone federally prosecuted under SORNA can be subjected to state penalties or transferred to state custody instead. Unless a former federal sex offender proves that a state has made it impossible for him to register,[34] he is subject to federal prosecution and up to ten years of imprisonment for failing to update his state

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[34] *See* 18 U.S.C. § 2250(b); Resp. to Pet. for Reh'g En Banc at 12.

registration within three days of a change of address, employment, name, or student status, even if the state believes a more moderate response would be appropriate[35] (which Texas and many other states apparently do[36]). The state is thus forced into the binary choice of keeping a former federal sex offender off its own registry entirely or subjecting him to § 2250(a)(2)(A)'s harsh penalties; it cannot control the punishment given to those who fail to update their registration.

Thus, because SORNA mandates federal penalties for the failure of a *state* resident to update his *state* sex offender registration solely because of an *intrastate* change of address without giving states a veto of the sort present in *Comstock*, it is a much more substantial imposition on the states' traditional police-power author-

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[35] *See* 42 U.S.C. § 16913(a)-(c) (requiring a sex offender to register in each jurisdiction in which he resides and to update that registration); 18 U.S.C. § 2250(a) (criminalizing the failure to update registration upon any change of address if one has been convicted of a federal sex offense); U.S. DEP'T OF JUSTICE, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION 6 (2008), *available at* http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf ("[SORNA] generally constitutes a set of *minimum* national standards and sets a floor, not a ceiling, for jurisdictions' programs.").

[36] Texas and forty-six other states do not substantially comply with SORNA. TEX. SENATE CRIMINAL JUSTICE COMM., INTERIM REPORT TO THE 82ND LEGISLATURE 14 (2011), *available at* http://www.senate.state.tx.us/75r/senate/commit/c590/c590.InterimReport81.pdf. One of the problems with SORNA is that it "relies solely on [the] offense" of conviction to determine whether a former sex offender is a threat to public safety, not "risk assessments" of a sex offender's likelihood to reoffend. *Id.*; *see also id.* at 19 (recommending risk assessments). In addition, it does so without any apparent increase in effectiveness, because "[t]he recidivism rate of those on the registry is not lower than that of the individuals not on the registry." *Id.* at 16.

ity over the criminal law within their own borders than what was at issue in *Comstock*. It is true that § 2250(a)(2)(A) applies only to federal sex offenders; but, as we have discussed, in the case of persons such as Kebodeaux those are individuals with whom the federal government had previously severed all ties. Accordingly, the fourth *Comstock* "consideration" ultimately cuts in Kebodeaux's favor.

E.

The final factor is whether the "links between [the statute] and an enumerated Article I power are not too attenuated" and the "statutory provision [is not] too sweeping in its scope." *Comstock*, 130 S. Ct. at 1963. The panel majority's position was that the statute is narrow because it applies only to sex offenders. But even assuming that a statute that applies to all sex offenders were considered narrow, its *logic* is expansive, because the only jurisdictional basis for § 2250(a)(2)(A) is the fact that a person once committed a federal sex crime. That reasoning opens the door, as discussed in part II.C, to congressional power over anyone who was ever convicted of a federal crime of any sort. That is anything but narrow. Accordingly, the fifth *Comstock* factor also cuts in Kebodeaux's favor.

F.

In summary, even taking into account "the breadth of the Necessary and Proper Clause," *Comstock*, 130 S. Ct. at 1965, SORNA's registration requirements and criminal penalty for failure to register as a sex offender, as applied to those, like Kebodeaux, who had already been unconditionally released from federal custody or supervision at the time Congress sought to regulate them, are not "rationally related" or "reasonably adapted" to Con-

gress's power to criminalize federal sex offenses to begin with. The statute's regulation of an individual, after he has served his sentence and is no longer subject to federal custody or supervision, solely because he once committed a federal crime, (1) is novel and unprecedented despite over 200 years of federal criminal law, (2) is not "reasonably adapted" to the government's custodial interest in its prisoners or its interest in punishing federal criminals, (3) is unprotective of states' sovereign interest over what intrastate conduct to criminalize within their own borders, and (4) is sweeping in the scope of its reasoning. For those reasons, and with high respect for its careful reasoning, the panel majority wrongly decided this case.[37]

III.

Finally, the government, like the panel concurrence, offers an alternative argument for upholding the statute: that SORNA's registration requirements for feder-

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[37] The panel majority also urged that it would be unwise to decide in favor of Kebodeaux because that would require disagreeing with *United States v. George*, 625 F.3d 1124, 1130 (9th Cir. 2010), *vacated on other grounds*, 672 F.3d 1126 (9th Cir. 2012). That case, however, is easily distinguishable.

Because the defendant in *George* was convicted in 2008, compliance with SORNA was an explicit condition of his sentence. 18 U.S.C. § 3583(d). He therefore fell into the category of offenders to whom SORNA is perfectly constitutional. But because Kebodeaux was long free from federal custody before SORNA even existed, he is in a different category that *George* had no occasion to consider. To the extent *George* implies that the federal government has Article I power to regulate anyone who ever committed a federal sex crime—and by implication anyone who ever committed any federal crime, because it has a "direct supervisory interest" over them—its reasoning stretches far beyond the issue before that court and is unpersuasive.

al sex offenders, and the criminal penalties for failing to comply, are necessary and proper to effect Congress's Commerce Clause power. Under its Commerce-Clause and Necessary-and-Proper-Clause authority, Congress may (1) "regulate the use of the channels of interstate commerce," (2) "regulate and protect the instrumentalities of . . . or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) "regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."[38]

The panel concurrence maintains that this case fits into the first two categories of Commerce Clause authority. According to that view, SORNA's regulation of federal sex offenders can be seen as necessary and proper regulation of "the channels of" or "persons . . . in interstate commerce" because it reduces the risk of unmonitored interstate travel by sex offenders. The argument in the concurrence runs as follows: Because a federal sex offender would face no federal sanction for failing to register until he travels interstate, he could hide from authorities before he does so. Thus, to prevent the purported *risk* that he evades detection before traveling interstate, no requirement of interstate travel ought to be necessary; Congress should be able to criminalize the mere act of failing to register, even if a sex

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[38] *See Lopez*, 514 U.S. at 558-59, 567, 115 S. Ct. 1624 (citation omitted) (holding that because the Gun-Free School Zones Act does not fall within any of the three categories, it is an unconstitutional exercise of federal power).

offender never travels interstate, because it reduces the risk that he will someday travel interstate undetected.

Thus, the concurring judge on the panel would subtly but significantly expand Congress's power under the first two categories of Commerce Clause authority beyond the regulation of "*the use of* the channels of interstate commerce" or "persons or things *in* interstate commerce," *Lopez*, 514 U.S. at 558, 115 S. Ct. 1624 (emphasis added), to the regulation of *the possible use* of the channels of interstate commerce and persons or things *because they will potentially* be in interstate commerce. With due respect for the concurrence's well-stated position, its contention is both contrary to precedent and so expansive that it would confer on the federal government plenary power to regulate all criminal activity—precisely what the Court sought to avoid in *Lopez* and *Morrison*.

A.

1.

Under the first category of its Commerce Clause authority, Congress may regulate the use of the channels of interstate commerce: "the use of the interstate transportation routes through which persons and goods move." *Morrison*, 529 U.S. at 613 n.5, 120 S. Ct. 1740 (internal quotation marks omitted). "Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil. . . . "[39] Because the federal gov-

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[39] *N. Am. Co. v. SEC*, 327 U.S. 686, 705, 66 S. Ct. 785, 90 L. Ed. 945 (1946) (citing *Brooks v. United States*, 267 U.S. 432, 436-37, 45 S. Ct. 345, 69 L. Ed. 699 (1925)); *accord Lopez*, 514 U.S. at 558, 115 S. Ct.

ernment "exercis[es] [a] police power . . . within the field of interstate commerce," *Brooks*, 267 U.S. at 436-37, 45 S. Ct. 345, *i.e.*, with respect to the channels, instrumentalities, persons, and goods involved in interstate commerce, Congress may regulate those who use the channels of interstate commerce even if their activity is non-economic in nature. Thus, for example, Congress may prohibit "enticing a woman from one state to another for immoral ends, whether for commercial purposes or otherwise," *id.* at 437, 45 S. Ct. 345, transporting kidnaped persons across state lines, *United States v. Darby*, 312 U.S. 100, 113, 61 S. Ct. 451, 85 L. Ed. 609 (1941), traveling across state lines to commit domestic violence, *United States v. Lankford*, 196 F.3d 563, 572 (5th Cir. 1999), or traveling interstate as a state sex offender without having first registered as such.[10]

But just as this category of Commerce-Clause authority gives the federal government a "police power" over those who use the channels of interstate commerce, even if their activity is non-commercial, *Brooks*, 267 U.S. at 437, 45 S. Ct. 345, the corollary is that that police power must also be limited to the "field of interstate commerce," *see id.* at 436, 45 S. Ct. 345. For example, although Congress may regulate those who use the channels of interstate commerce for any reason, "[t]he regulation . . . of *intrastate* violence that is not directed at the instrumentalities, channels, or goods in-

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1624 ("Congress may regulate the use of the channels of interstate commerce.").

[10] *See United States v. Whaley*, 577 F.3d 254, 258 (5th Cir. 2009) ("Because § 2250[(a)(2)(B)] applies only to those failing to register or update a registration after traveling in interstate commerce—in this case, Whaley traveled from Kansas to Texas—it falls squarely under the first *Lopez* prong.").

volved in interstate commerce has always been the province of the States." *Morrison*, 529 U.S. at 618, 120 S. Ct. 1740 (emphasis added).

In *Whaley*, 577 F.3d at 259-60, in which this court upheld SORNA's requirement that state sex offenders register their address—as distinguished from the federal sex-offender-registration requirement at issue here—we were careful to limit our holding by explaining that the statute at issue there neither targets nor sanctions anyone who did not in fact use the channels of interstate commerce. We explained that, with respect to state sex offenders, SORNA punishes a person only *if he travels interstate* without having first registered or updated his registration. *Id.* at 261. Thus, the registration requirement's "focus" with regard to state offenders is solely on enforcing the criminal prohibition on traveling interstate without having registered—"rather than on requiring sex offender registration generally." *Id.* at 259.[41]

2.

As the Court explained in *Carr*, 130 S. Ct. at 2238, however, Congress "chose to handle federal and state sex offenders differently."[42] In contrast to SORNA's regulatory scheme with regard to state sex offenders, Congress, for federal offenders, "requir[es] sex offender

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[41] *See also id.* at 260 ("And perhaps most significantly . . . a [state] sex offender who does not travel in interstate commerce may ignore SORNA's registration requirements without fear of federal criminal consequences.").

[42] *Compare* 18 U.S.C. § 2250(a)(2)(A) *with* § 2250(a)(2)(B). The structure of § 2250(a) is such that all federal sex offenders are covered under § 2250(a)(2)(A), but all remaining sex offenders, *i.e.*, state sex offenders, are under § 2250(a)(2)(B).

registration generally." *Whaley*, 577 F.3d at 259. The statutes regulating the movement of all federal sex offenders, 42 U.S.C. § 16913 and 18 U.S.C. § 2250(a)(2)(A), apply to all intrastate as well as interstate movement without regard to whether a sex offender ever uses the channels of interstate commerce. Those statutes therefore do not regulate only activity "directed" at the channels of interstate commerce. *Morrison*, 529 U.S. at 617, 120 S. Ct. 1740. Federal sex offenders are subject to criminal sanctions if they fail to register or update their registration even if they never step foot outside their state. In short, federal sex offenders are regulated merely by virtue of the fact that they are federal sex offenders. The view expressed in the panel concurrence would thus do away with precisely the limits we considered crucial to our holding in *Whaley*.

Indeed, notably, the Solicitor General has expressly denied that § 2250(a)(2)(A) is constitutional as a regulation of the channels of interstate commerce, asserting instead that it applies because the federal government has a "direct supervisory interest" over those who committed federal offenses, *see Carr*, 130 S. Ct. at 2238-39, irrespective of whether they have a connection to interstate commerce.[43] Here the government makes an

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[43] In *Carr*, the Solicitor General expressly asserted that § 2250(a) "reaches two categories of sex offenders: those whose underlying sex offenses were criminalized by virtue of federal or tribal authority . . . , and all other sex offenders whose actions directly implicated Congress's Commerce Clause authority as a result of 'travel[ing] in interstate or foreign commerce. . . . '" Brief for United States at 21-22, *Carr*, 130 S. Ct. 2229 (No. 08-1301), 2010 WL 181570, at *21-22; *see Carr*, 130 S. Ct. at 2238 ("According to the Government, these categories correspond to two alternate sources of power to achieve Congress's aim of broadly registering sex offenders." (internal quotation marks omitted)).

about-face only now that its original justification for the statute's constitutionality—that of the panel majority—is in question in light of the fact that the panel opinion has been vacated for rehearing en banc.

3.

The panel concurrence nevertheless urges that SORNA's registration scheme for federal sex offenders is constitutional as well, because it allows the federal government better to monitor sex offenders in case they someday travel interstate. The concurrence therefore would expand the federal police power over individuals who "use . . . the channels of interstate commerce," *see Lopez*, 514 U.S. at 558, 115 S. Ct. 1624; *Brooks*, 267 U.S. at 437, 45 S. Ct. 345, to those who might someday do so.

Neither this court nor the Supreme Court, however, has ever extended Congress's "police power" over those who use the channels of interstate commerce to punish those who are not presently using them but might do so. The theory expressed in the panel concurrence is unprecedented,[44] and for good reason: Because every per-

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[44] The recent Tenth Circuit case that the panel concurrence cited is inapposite; it addresses only whether § 2250(a)(2)(A) is constitutional under the Commerce Clause on the assumption that requiring intrastate sex offender registration is constitutional, an assumption that trivializes the whole question. *See United States v. Yelloweagle*, 643 F.3d 1275, 1289 (10th Cir. 2011) (holding that Congress has the power to criminalize a federal sex offender's intrastate failure to register under § 2250(a)(2)(A) *on the conceded assumption* that it has the power to require a federal sex offender to register purely intrastate activity), *cert. denied*, — U.S. —, 132 S. Ct. 1969, 182 L. Ed. 2d 821 (2012). If anything, that the panel majority made sure to consider the issue only on those exceptionally narrow grounds suggests that it attempted to avoid precisely the weightier question that we face here.

son is mobile, anyone might someday travel interstate. Thus, by the reasoning of the concurrence, the federal government could regulate anyone on that ground who might someday travel interstate. Myriad, longstanding federal statutes, both economic and non-economic, that have as a jurisdictional nexus the movement of a person across state lines would suddenly no longer need that nexus.[45]

For example, it is a federal crime to travel across state lines to evade child-support obligations. 18 U.S.C. § 228(a)(2). As with former federal sex offenders, deadbeat parents might move around within a state to evade state authorities, and as with former federal sex offenders, that might increase the risk that they go undetected before they travel across state lines. Therefore, by the logic of the panel concurrence, the federal government should be able to regulate the intrastate movement of deadbeat parents as well.

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[45] *See, e.g.*, 18 U.S.C. § 228(a)(2) (criminalizing interstate travel to evade child support obligations); § 1073 (interstate flight to avoid prosecution, giving testimony, service of process, or contempt proceedings under state or federal law); § 1201(a)(1) (interstate transportation of a kidnaped person); § 1231 (interstate transportation of strikebreakers); § 1369 (interstate travel with intent to injure or destroy a public monument); § 2101 (interstate travel with intent to cause riots); § 2261(a)(1) (interstate travel with intent to commit domestic violence); § 2421 (interstate transportation of prostitutes); § 2423 (interstate transportation of minors for illicit purposes); *Morrison*, 529 U.S. at 613 n.5, 120 S. Ct. 1740 (noting 18 U.S.C. § 2261(a)(1), which criminalizes interstate spousal abuse). Most obviously, 18 U.S.C. § 2250(a)(2)(B), which criminalizes a state sex offender's travel across state lines without having registered, would no longer need interstate travel as a jurisdictional hook; Congress could require registration of all sex offenders generally.

Thus, Congress could require anyone who owes child support obligations under state law to report their changes of address to the federal government, and if they do not, the Attorney General could criminally prosecute them; the government would no longer need to wait until deadbeat parents cross state lines: The crime would be complete when they move intrastate without notifying federal authorities, because of the likelihood that they might otherwise someday cross state lines undetected. The federal government could, as here, use the mere risk of travel across state lines to justify far-reaching intrastate regulation in an area of traditional and exclusive state concern.

Indeed, there is nothing about the panel concurrence's reasoning that limits its application to reporting requirements and criminal punishments for failing to comply with them. For example, it is a federal crime to transport a kidnaped person across state lines. 18 U.S.C. § 1201(a)(1). As with former federal sex offenders, someone who is transporting a kidnaped person is capable of moving around and thereby potentially evading state authorities. And as with former federal sex offenders, were the federal government to have no jurisdiction over kidnappers until they cross state lines, the likelihood that they would evade authorities before traveling interstate would be greater. Thus, according to the concurrence, the federal government should have the power to criminalize the intrastate transportation of kidnaped persons, just as it should have the power to proscribe the intrastate movement of sex offenders who did not register, because, in both cases, it would reduce the risk that the criminals evade detection before crossing state lines.

More generally still, every crime (indeed every act) brings with it the risk that the perpetrator will flee across state lines before being detected. Although the panel concurrence is stated in the context of former sex offenders, there is nothing limiting its logic to past, rather than present, criminals. Accepting his logic—that the mere risk that a dangerous person will cross state lines undetected gives the federal government authority to police his intrastate movements preemptively—would mean that the federal government would have the power to arrest someone who committed a murder, rape, or any other crime traditionally subject to state authority on the ground that he might otherwise evade state authorities and escape across state lines undetected after doing so. In short, the concurrence offers no limiting principle that would allow the federal government to track and arrest former sex offenders because they might someday travel interstate, but not allow it to do the same to anyone else for that same reason.

4.

The basic flaw in the panel concurrence is that it overlooks the role of the states in policing within their own borders, relying on the implicit premise that the federal government must regulate sex offenders' intrastate movements because the states will not do so. Every state has its own sex offender registry and has every incentive to track and arrest sex offenders as long as they remain intrastate. For example, it was state, not federal, authorities—specifically, El Paso Police Department officers—who both registered Kebodeaux and discovered that he had failed to update his registration. Indeed, the federal sex-offender registry consists of nothing more than the amalgamation of state registry

(along with tribal and territorial registry) data obtained from local officials.[46]

Only if a sex offender travels out-of-state—i.e., uses the channels of interstate commerce—does a state's jurisdiction end, making it inadequate to the task of tracking and arresting a sex offender—and the federal government's role there begins. To give, instead, to the federal government the overlapping power to do exactly what a state could already do itself, in an area completely unrelated to commerce, just because criminals, like all human beings, can potentially cross state lines, would violate basic tenets of federalism.[47] In effect, the panel concurrence asserts that the federal government should be able to police individuals within state borders just because states might not do so and those individuals might thus pose a risk to inhabitants of other states. But the

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[46] *See* 42 U.S.C. §§ 16920-16921 (stating that the National Sex Offender Registry's web site shall include "relevant information . . . listed on a jurisdiction's Internet site" and that the Attorney General shall include information in the Registry obtained from "an appropriate official in the jurisdiction" of registration); *Sex Offender Registry Websites*, FBI.GOV, http://www.fbi.gov/scams-safety/registry (last visited June 6, 2012) (linking to every state sex offender registry and explaining that "the national registry simply enables a search across multiple jurisdictions").

[47] *See Morrison*, 529 U.S. at 611, 120 S. Ct. 1740 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur" (quoting *Lopez*, 514 U.S. at 577, 115 S. Ct. 1624 (Kennedy, J., concurring)), "and political responsibility would become illusory," *Lopez*, 514 U.S. at 577, 115 S. Ct. 1624 (Kennedy, J., concurring)).

federal government's jurisdiction does not expand or contract based on a state's criminal-policy choices.[48]

B.

The panel concurrence fares no better under the second category of Congress's Commerce-Clause authority: Congress may regulate the instrumentalities of, and, as most relevant here, persons or things in, interstate commerce, as well as intrastate activities threatening them. *Lopez*, 514 U.S. at 558, 115 S. Ct. 1624. For example, the Court has upheld the regulation of vehicles used in interstate commerce,[49] the destruction of aircraft,[50] and thefts from interstate shipments[51] on those grounds.

The panel concurrence took this category of authority to mean that Congress may police any person or thing that might cross state lines. That misunderstands the precedent. First, crossing state lines does not mean a person is engaging "in interstate commerce," because that mere fact does not constitute engaging in "commerce" by any definition of the term. Rather, it constitutes a "use of the channels of interstate commerce," which the first category of Commerce-Clause authority is meant to regulate. *See* part III.A. With all due respect, the concurrence thus confuses the first category of regulable activity with the second.

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[48] *See Darby*, 312 U.S. at 114, 61 S. Ct. 451 ("Th[e power of Congress over interstate commerce] can neither be enlarged nor diminished by the exercise or non-exercise of state power.").

[49] *Lopez*, 514 U.S. at 558, 115 S. Ct. 1624 (citing *S. Ry. Co. v. United States*, 222 U.S. 20, 32 S. Ct. 2, 56 L. Ed. 72 (1911)).

[50] *Id.* (citing *Perez v. United States*, 402 U.S. 146, 150, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971)).

[51] *Id.* (citing *Perez*, 402 U.S. at 150, 91 S. Ct. 1357).

Second, a person who only *might* cross state lines is not engaging "in interstate commerce," because he has not yet engaged in interstate activity. Thus, SORNA's sex-offender-registration requirements do not regulate persons *in* interstate commerce, because sex offenders do not engage in activity that is either "interstate" or "commerce" just by virtue of being sex offenders. That a person might someday engage in interstate commerce is very different from saying that he is a "person[ ] . . . in interstate commerce." *Lopez*, 514 U.S. at 558, 115 S. Ct. 1624. Under this category of authority, Congress may regulate and protect the latter, not the former. *See id.*

Lastly, though Congress may protect the instrumentalities of, and persons or things in, interstate commerce from intrastate threats, those threats must be "directed at" the instrumentalities of, or persons or things in, interstate commerce; they cannot just be a general threat to society of the sort that sex offenders pose.[52] For example, Congress may regulate the destruction of an "aircraft used, operated, or employed in interstate, overseas, or foreign air commerce," 18 U.S.C. § 32(a)(1), even though the destructive activity occurs within a single state, because aircraft are themselves "instrumentalities of interstate commerce," *Perez*, 402 U.S. at 150, 91 S. Ct. 1357. Analogously, Congress may regulate thefts from interstate shipments, even though the thefts occur within a single state, because the shipments themselves are "things in [interstate] commerce." *Id.* (citing 18

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[52] *See Morrison*, 529 U.S. at 618, 120 S. Ct. 1740 ("The regulation . . . of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426, 428, 5 L. Ed. 257 (1821) (Marshall, C.J.))).

U.S.C. § 659). Those regulations are permissible because Congress limited itself to regulating threats "directed at" interstate commerce. *See Morrison*, 529 U.S. at 618, 120 S. Ct. 1740.

In short, none of the Court's cases under the second Commerce Clause category even hints, let alone turns on the fact, that Congress could regulate someone because he *might someday* threaten interstate commerce. And for good reason: By that flawed logic, Congress could regulate ordinary thieves on the ground that they pose a "threat" to interstate commerce by virtue of the fact that, someday, they might steal an instrumentality of interstate commerce. Accordingly, the panel concurrence's reliance on the second Commerce Clause category is unpersuasive.

C.

Indeed, it is telling that the panel concurrence's main source of authority is *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), which held that a congressional statute prohibiting marihuana possession was constitutional under the third category of Commerce-Clause authority, Congress's "power to regulate activities that substantially affect interstate commerce," *id.* at 17, 125 S. Ct. 2195. Indeed, the Court stated that "[o]nly the third category" of Congress's Commerce-Clause authority was "implicated in the case at hand." *Id.* It logically follows that the Court believed that the case did not "implicate" the two other "categories" of Commerce-Clause power—those at issue here: Congress's powers to "regulate the channels of interstate commerce" and to "regulate and protect . . . persons or things in interstate commerce." *See id.* at 16-17, 125 S. Ct. 2195. That is unsurprising, given that the

statute at issue criminalized purely intrastate marihuana possession, which is not a part of "the channels of" or a "thing[] in interstate commerce" or a "threat" to "things in interstate commerce."

Moreover, in holding that the marihuana-possession statute was constitutional under the third Commerce-Clause category, the *Raich* Court explicitly based its decision on the fact that the statute was part of a comprehensive regulation of "quintessentially economic" activity.[53] That the statute regulated economic activity was what distinguished the case from *Lopez* and *Morrison*, which struck down statutes regulating intrastate conduct because of the "noneconomic, criminal nature of the conduct at issue."[54] *Raich* thus merely followed the line drawn in *Lopez* and *Morrison* between economic and non-economic activity under the third category.

In contrast to the statute in *Raich*, and like the statutes in *Lopez* and *Morrison*, the statute here regulates non-economic, intrastate conduct that is not "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624. It is a criminal statute that "by its terms has nothing to do with 'com-

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[53] *See Raich*, 545 U.S. at 25, 125 S. Ct. 2195 ("Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic."); *id.* at 25-26, 125 S. Ct. 2195 (defining "economic" activity as "the production, distribution, and consumption of commodities").

[54] *See Morrison*, 529 U.S. at 610-11, 120 S. Ct. 1740 ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. . . . *Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based on the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." (citations omitted)).

merce' or any sort of economic enterprise, however broadly one might define those terms." *Morrison*, 529 U.S. at 610, 120 S. Ct. 1740 (quoting *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624). It would thus fail the *Lopez/Morrison/Raich* test under the third Commerce Clause category, as it should. To hold a non-commercial statute regulating purely intrastate conduct constitutional would read the word "commerce" out of the Commerce Clause.[55]

But by the logic urged in the panel concurrence, *Raich* should not have turned on the economic/non-economic distinction or on the third category of Commerce Clause authority at all. Because marihuana possessed intrastate surely *poses a risk* of subsequently moving interstate, the Court instead should have found the statute constitutional as a regulation of "the channels of" or "things in interstate commerce" without any need to resort to the catchall category of intrastate "activities that substantially affect interstate commerce." But that was not what the Court did or said in *Raich*.

The panel concurrence's reliance on the first two "categories" of Congress's Commerce-Clause authority instead of the third amounts to an avoidance of *Lopez*, *Morrison*, and *Raich*. That reasoning, far from faithfully applying *Raich*, expands the first two "categories" to cover non-economic, intrastate activities that could not be regulated under the third. The fatal flaw with that argument is that it fails to come to terms with the role of the economic/non-economic distinction in the Court's Commerce-Clause jurisprudence: To be constitutional,

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[55] *See id.* at 613, 120 S. Ct. 1740 ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

regulations of intrastate activity affecting interstate commerce must, logically, have something to do with *commerce*. The statute at issue here does not.

D.

Finally, the panel concurrence contends that § 2250(a)(2)(A), although a regulation of *intra*state activity, is constitutional as a necessary and proper means of enforcing § 2250(a)(2)(B)'s regulation of *inter*state travel under *Raich*.[56] But it is questionable how subsection (A), which criminalizes *federal* sex offenders' failure to update registration, helps effect subsection (B), which criminalizes *state* sex offenders' failure to update. Subsection (B) makes it a crime for a state sex offender to fail to update his registration *if* he travels in interstate commerce without having registered. Subsection (A) mirrors subsection (B) for federal sex offenders, except that there is no interstate-travel requirement. Not having an interstate travel requirement for *federal* sex offenders in no way helps to protect society from the interstate travel of *state* sex offenders.

E.

Therefore, as we have explained, the approach reflected in the panel concurrence fails, because it is an attempt to place under the Commerce Clause a regulation that is neither "interstate" nor "commercial."

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[56] *See Raich*, 545 U.S. at 22, 125 S. Ct. 2195 (holding that Congress has the authority to enact "comprehensive legislation to regulate the interstate market" even where that "regulation ensnares some purely intrastate activity"); *see Whaley*, 577 F.3d at 259 (upholding 42 U.S.C. § 16913—which requires sex offenders to register changes of address—even though it applies to intrastate activity, because, without it, "§ 2250 [which criminalizes the failure to register] has no substance").

SORNA's regulation of federal sex offenders does not fit into any of the three categories of regulations that the Supreme Court has upheld under the Commerce Clause, so it cannot be justified under the commerce power.

Upholding § 2250(a)(2)(A) would go a big step further than has the applicable caselaw, because, unlike § 2250(a)(2)(B), this statute regulates federal sex offenders "generally," *Whaley*, 577 F.3d at 259, regardless of whether they engage in interstate activity.[58] The activity criminalized by § 2250(a)(2)(A) is thus not "directed" at interstate commerce in the way that *all* previously upheld provisions regulating the use of the channels of interstate commerce have been.[58]

IV.

In summary, and for the reasons discussed in parts II and III, 42 U.S.C. § 16913's registration requirements and § 2250(a)(2)(A)'s criminal penalties for failing to register after intrastate relocation are unconstitutional solely as they apply to former federal sex offenders who had been unconditionally released from federal custody before SORNA's passage in 2006. Every federal sex of-

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[57] *Cf. Carr*, 130 S. Ct. at 2248 (Alito, J., joined by Thomas and Ginsburg, JJ., dissenting) (noting that it "can also be argued" that interpreting § 2250(a)(2)(B)—the state sex offender provision—to apply to interstate travel that occurred before SORNA's enactment "would mean that Congress exceeded its authority under the Commerce Clause."). That is *a fortiori* the case here, with the government arguing that an analogous statute requiring no interstate travel at all is constitutional.

[58] *See Morrison*, 529 U.S. at 618, 120 S. Ct. 1740 ("The regulation . . . of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." (citing *Cohens*, 19 U.S. (6 Wheat.) at 428) (Marshall, C.J.)).

fender subject to federal custody or supervision when SORNA was enacted, or who was convicted since then, is unaffected. Moreover, those who had been unconditionally released before SORNA's passage need not go unmonitored; they could still be regulated just as state sex offenders currently are under federal law, and they remain subject to state authority.

The statute is an unlawful expansion of federal power at the expense of the traditional and well-recognized police power of the state.[59] The conviction is REVERSED, and a judgment of dismissal is RENDERED.

OWEN, Circuit Judge, concurring:

I join in the judgment reached by a majority of the en banc court. I do not entirely agree, however, with the majority's analysis of Kebodeaux's obligations under federal law to register as a sex offender at the time he completed his sentence for unlawful sexual relations with a fifteen-year-old.

When Kebodeaux was sentenced in court martial proceedings in 1999, he was required by federal law "to register in any State in which [he] resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation"[1] if that State required registration. Kebodeaux could have been prosecuted under *federal* law, former 42 U.S.C. § 14072, for knowingly failing to register in any State in which he re-

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[59] The unconstitutionality applies only as to those in the narrow and specific circumstance faced by Kebodeaux, and we make no holding as to others.

[1] 42 U.S.C. § 14072(i)(4) (Supp. IV 1999), *repealed by* Sex Offender Registration and Notification Act, Pub. L. No. 109-248, 120 Stat. 587 (2006).

sides.[2] Federal law did not require States to require federal offenders such as Kebodeaux to register, but it encouraged them to do so.[3] Among other requirements, Texas laws obligated Kebodeaux to register with Texas authorities when he entered the state and to provide notice of a change of residence within the state or the intent to change residence within the state.[4] Prior to the enactment of SORNA, Kebodeaux could have been convicted under *federal* law, former 42 U.S.C. § 14072(i)(4),

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[2] *See id.*, which provided:

> (i) Penalty
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> A person who is—
>
> (4) sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105-119, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

[3] *See* 42 U.S.C. § 14071(b)(7) (Supp. IV 1999), *repealed by* Sex Offender Registration and Notification Act, Pub. L. No. 109-248, 120 Stat. 587 (2006):

> (7) Registration of out-of-State offenders, Federal offenders, persons sentenced by courts martial, and offenders crossing State borders
>
> As provided in guidelines issued by the Attorney General, each State shall include in its registration program residents who were convicted in another State and shall ensure that procedures are in place to accept registration information from—
>
> (A) residents who were convicted in another State, convicted of a Federal offense, or sentenced by a court martial . . . .

[4] *See* TEX. CODE CRIM. PROC. art. 62.051.

if he moved from El Paso, Texas to San Antonio, Texas and failed to notify Texas authorities of this intrastate change in residence in the manner required by state law. There would have been no constitutional infirmity in this federal law as applied to Kebodeaux because the federal requirement to comply with state registration requirements was in existence at the time that he was sentenced in the court martial proceedings. Congress was well within its powers under the Necessary and Proper Clause to impose conditions such as intrastate registration and reporting requirements on federal sex offenders in connection with their convictions and sentencing.

SORNA expanded registration requirements for sex offenders. However, the question before us is whether Congress had the authority to criminalize the conduct for which Kebodeaux was convicted. Kebodeaux was prosecuted under 18 U.S.C. § 2250(a) for knowingly failing to "update a registration *as required by [SORNA].*"[5] The registration requirements applicable

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[5] 18 U.S.C. § 2250(a) (emphasis added). That section provides:

§ 2250. Failure to register

(a) In general.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

to Kebodeaux under SORNA included the obligation to keep his registration current in the jurisdiction in which he was residing and that he provide notice of a change of his residence within three business days, but not necessarily to the State in which he was residing.[6] These requirements differ from Texas law. One difference is that under Texas law, a sex offender has seven days within which to provide notice of a change of address.[7] Kebodeaux conceivably could have been convicted under SORNA for conduct that complied with State law and therefore would have also complied with the federal law to which Kebodeaux was subject at the time he was convicted and sentenced.

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shall be fined under this title or imprisoned not more than 10 years, or both.

[6] 42 U.S.C. § 16913. That section provides in pertinent part:

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

. . . .

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

[7] TEX. CODE CRIM. PROC. art. 62.051(a).

There is another difference between the federal law in effect when Kebodeaux was sentenced in 1999 and the provisions of SORNA under which he was prosecuted. The federal criminal statute that obtained in 1999, former 42 U.S.C. § 14072(i)(4), provided that the maximum term of imprisonment for a first offense of failing to register in a State was "not more than 1 year," while under SORNA, the maximum term of imprisonment for a first offense is 10 years.[8] Kebodeaux was convicted under SORNA and sentenced to more than one year of imprisonment—one day more.

The question, then, is whether, after Kebodeaux had completed his federal sentence and had been released from federal oversight other than the reporting requirements imposed at the time he was sentenced, Congress could constitutionally subject Kebodeaux to federal reporting requirements that criminalized failure to comply with federal, as opposed to State, reporting requirements regarding intrastate changes of residence, and that increased the punishment for failure to comply with reporting requirements. I agree with a majority of the en banc court that Congress could not constitutionally apply SORNA to Kebodeaux's intrastate relocations under either the Necessary and Proper Clause or the Commerce Clause. I accordingly concur in the judgment.

DENNIS, Circuit Judge, joined by KING, Circuit Judge, dissenting:

I respectfully dissent.

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[8] 18 U.S.C. § 2250(a).

I.

The majority's decision misinterprets and hobbles Congress's use of its enumerated and implied constitutional powers to enact the Sex Offender Registration and Notification Act (SORNA or Act) for the purpose of deterring dangerous sex offenders nationwide from moving either intrastate or interstate in evasion of SORNA registration and updating requirements to prey on children and other vulnerable sex crime victims. SORNA establishes a comprehensive federal and state legal system that, *inter alia*, requires convicted sex offenders to register, and to keep their registrations current, in each locality where they live, work, and go to school, 42 U.S.C. § 16913(a)-(c); withholds federal funds from participating jurisdictions that fail to substantially implement SORNA, *id.* § 16925(a); requires each participating jurisdiction to enact criminal penalties for the failure of a sex offender to comply with SORNA registration and updating requirements within each jurisdiction, *id.* § 16913(e); makes it a federal crime for a convicted sex offender who moves in interstate commerce and knowingly fails to abide by the Act's registration requirements, 18 U.S.C. § 2250(a)(1), (2)(B), (3); and makes it a federal crime for a person convicted as a sex offender under federal law to knowingly fail to abide by SORNA's registration and updating requirements, *id.* § 2250(a)(1), (2)(A), (3).

The question raised by Kebodeaux and the majority opinion is whether SORNA's 18 U.S.C. § 2250(a)(2)(A) can constitutionally apply to a person convicted as a sex offender under federal law, who was released from federal custody prior to the enactment of SORNA, but who knowingly failed to update his registration after an intrastate residence change, as required by SORNA sub-

sequent to its effective date as specified by the Attorney General. 42 U.S.C. § 16913(d). The majority's answer is that SORNA's criminal, registration and notification provisions cannot constitutionally be applied to punish a federal sex offender for his knowing failure to register or update a registration following his intrastate change of residence if he had been released from federal custody prior to SORNA's enactment on July 27, 2006. The majority reaches this conclusion for two independent reasons:

First, although Congress undisputedly has the implied power under Article I of the Constitution to make criminal laws to govern persons in furtherance of Congress's enumerated legislative powers, *see, e.g., United States v. Comstock*, — U.S —, 130 S. Ct. 1949, 1957, 176 L. Ed. 2d 878 (2010), the majority concludes that power cannot be applied to punish a federal sex offender for his knowing failure to update his intrastate residence change under SORNA if he had been released from federal custody prior to the enactment of SORNA on July 27, 2006. Applying the "*Comstock* considerations," *see id.* at 1965, the majority recognizes first that Congress has broad authority to enact legislation under the Necessary and Proper Clause, *see id.* at 1956; that a statute must constitute a means that is "reasonably adapted" to an enumerated power; that Congress has a large discretion as to the choice of such means; and that courts must apply a presumption of constitutionality to Congress's enactments. Maj. Op. 235-36 [pp. 6a-7a, *supra*]. But the majority finds that the other "*Comstock* considerations" outweigh that presumption and show that SORNA is not reasonably adapted to Congress's undisputed Article I power to criminalize federal sex offenses because "[t]he statute's regulation of an individual, after he has served

his sentence and is no longer subject to federal custody or supervision, solely because he once committed a federal crime, (1) is novel and unprecedented despite over 200 years of federal criminal law; (2) is not 'reasonably adapted' to the government's custodial interest in its prisoners or its interest in punishing federal criminals; (3) is unprotective of states' sovereign interest over what intrastate conduct to criminalize within their own borders; and (4) is sweeping in the scope of its reasoning." Maj. Op. 245 [p. 24a, *supra*].

Alternatively, the majority concedes that Congress, under its Commerce Clause and Necessary and Proper Clause authority, may (1) "regulate the use of the channels of interstate commerce"; (2) "regulate and protect the instrumentalities of . . . or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." Maj. Op. 245 [p. 25a, *supra*] (alteration in original) (quoting *United States v. Lopez*, 514 U.S. 549, 558-59, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995)); *see also* Maj. Op. 245 n.38 [p. 25a n.38, *supra*] (describing *Lopez* as "holding that because the Gun-Free School Zones Act does not fall within any of the three categories, it is an unconstitutional exercise of federal power" (citing *Lopez*, 514 U.S. 549, 558-59, 567, 115 S. Ct. 1624, 131 L. Ed. 2d 626)). But the majority finds that Congress nonetheless lacked the authority to subject federal sex offenders released prior to the July 27, 2006 enactment of SORNA's registration requirements, 42 U.S.C. §§ 16913-16916, and pertinent criminal provision, 18 U.S.C. § 2250(a)(2)(A), because they, like the statutes that were struck down in *Lopez* and *United*

States v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000), constitute regulation of only intrastate non-economic activity.

II.

Failing to recognize that statutory interpretation is a "holistic endeavor," *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988); *accord United States v. Johnson*, 632 F.3d 912, 922 (5th Cir. 2011) (same), the majority opinion's reading of SORNA's text is incomplete and erroneous. Consequently, the majority fails to properly analyze and understand how Congress rationally and simultaneously adapted SORNA's provisions to the three constitutional powers they carry into execution: the spending power, the commerce power, and the power to enact criminal laws to further and to prevent interference with its enumerated powers. The majority totally disregards Congress's use in SORNA of its enumerated power to spend federal funds for the general welfare. Importantly, Congress used its spending power both to establish SORNA's purpose as a legitimate end of the legislation, and as one of the means, together with its Commerce Clause power and its power to legislate criminal laws to further and protect its enumerated powers, in carrying all of those powers into effect.

The majority analyzes, one at a time, only two congressional powers that SORNA seeks to execute, the Commerce Clause power and power to enact criminal laws pursuant to its enumerated powers, and finds that SORNA is not rationally adapted to execute either power. This analysis is manifestly incorrect, however, because in SORNA, Congress plainly used three, not just two, of its constitutional powers, and it used them simul-

taneously, not just one at a time. In doing so, Congress reasonably adapted the SORNA provisions as the necessary and proper means of carrying all three powers into effect at the same time. The three powers are Congress's enumerated spending power, U.S. Const. art. I, § 8, cl. 1, its enumerated Commerce Clause power, *id.* art. 1, § 8, cl. 3, and its well established implied power to enact criminal laws in furtherance of its enumerated powers, e.g., to regulate commerce, to spend funds for the general welfare, to enforce civil rights, and so forth, *see Comstock*, 130 S. Ct. at 1957-58 (citing U.S. Const. art. I, § 8, cls. 1, 3, 4, 7, 9; *id.* amends. XIII-XV). Recently, the Supreme Court recognized that SORNA uses these three powers in "seek[ing] to make the preexisting patchwork of federal and 50 individual state registration systems . . . more uniform and effective . . . by setting forth comprehensive registration-system standards; by making federal funding contingent on States' bringing their systems into compliance with those standards; by requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and by creating federal criminal sanctions applicable to those who violate the Act's registration requirements." *Reynolds v. United States*, — U.S. —, 132 S. Ct. 975, 978, 181 L. Ed. 2d 935 (2012) (citing, *inter alia*, 18 U.S.C. § 2250(a) (criminal provision), 42 U.S.C. §§ 16911(10), 16913-16916 (registration requirements), and 42 U.S.C. § 16925 (federal funding provision)).

Chief Justice Marshall famously summarized Congress's authority under the Necessary and Proper Clause in *McCulloch v. Maryland*, which has stood for nearly 200 years as the Court's definitive interpretation of that text:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

17 U.S. 316, 421, 4 Wheat. 316, 4 L. Ed. 579 (1819). Congress's purpose in enacting SORNA is to "protect the public from sex offenders and offenders against children" by joining and unifying the states and other jurisdictions in establishing a "comprehensive national system" for registration and notification of the public by sexual offenders. 42 U.S.C. § 16901. Thus, SORNA's purpose constitutes a legitimate end toward which a Congressional law may be directed—the spending of funds for the general welfare—and SORNA's provisions carry into execution that spending power as well as Congress's enumerated power to regulate interstate and foreign commerce and its implied power to enact criminal laws in furtherance of those enumerated powers.

The Supreme Court has also held that the Constitution "'addresse[s]' the 'choice of means primarily . . . to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.'" *Comstock*, 130 S. Ct. at 1957 (alterations in original) (quoting *Burroughs v. United States*, 290 U.S. 534, 547-48, 54 S. Ct. 287, 78 L. Ed. 484 (1934)). In my view, Congress did not abuse its discretion in enacting 42 U.S.C. § 16913 and 18 U.S.C. § 2250(a)(2)(A), as part of the interconnected and highly reticulated scheme of SORNA, in order to achieve the goal of establishing a comprehensive

national system for registration of, and notification by, sex offenders.

In *Sabri v. United States*, 541 U.S. 600, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004), the Court held that "Congress has authority *under the Spending Clause* to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has *corresponding authority* under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare." *Id.* at 605, 124 S. Ct. 1941 (emphases added). Similarly, in SORNA, Congress uses its spending power to induce the states and other defined jurisdictions to join in accomplishing its purpose by providing, *inter alia*, that: a participating jurisdiction that fails to substantially implement SORNA's requirements shall not receive 10 percent of the federal funds that would otherwise be allocated to the jurisdiction under SORNA, 42 U.S.C. § 16925(a); each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of SORNA, *id.* § 16912(a); each jurisdiction, other than a federally recognized Indian tribe, shall enact a criminal penalty that includes a maximum term of imprisonment that is greater than a year for the failure of a sex offender to comply with the requirements of SORNA, *id.* § 16913(e); the Attorney General shall maintain a national database at the Federal Bureau of Investigation for each sex offender and any other person required to register in a jurisdiction's sex offender registry, known as the National Sex Offender Registry, *id.* § 16919(a); and the Attorney General shall ensure (through the Registry or otherwise) that updated information about a sex offender is immediately electronically forwarded to all relevant jurisdictions, *id.*

§ 16919(b). The foregoing SORNA provisions are manifestly rationally adapted to carry Congress's spending power into execution for the legitimate purpose of establishing a comprehensive national system for the registration and notification by convicted sexual offenders to protect the public against sex offenders and offenders against children.

At the same time, in SORNA, Congress under its power to enact federal laws to criminalize conduct that would interfere with its enumerated powers, criminalized a knowing failure by a federal sex offender to register or update a registration. Thus, while Congress used its spending clause power to induce each jurisdiction to enact a criminal penalty for the failure of a sex offender to comply with the requirements of SORNA, *see* 42 U.S.C. § 16913(e), it also enacted a federal criminal law counterpart that provides that a federal sex offender who knowingly fails to register or update a registration as required by SORNA shall be fined or imprisoned not more than 10 years, or both, 18 U.S.C. § 2250(a)(2)(A). This latter provision enables the federal government to prosecute and convict federal sex offenders who knowingly fail to register, or to keep the registration current in each place where the offender resides, is an employee, or is a student, as required under § 16913(a)-(c). The states and other defined jurisdictions are enabled to prosecute and convict sex offenders who knowingly fail to comply with the requirements of SORNA under the criminal penalties the participating states and other jurisdictions are required to enact by § 16913(e). *See, e.g.*, 42 U.S.C. § 16913(c) (Every sex offender "shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved" and "inform that ju-

risdiction of all changes in the information required for that offender in the sex offender registry."). Thus, a federal sex offender, such as Kebodeaux, who fails to update his registration as required by SORNA, after changing his residence intrastate, may be prosecuted, convicted and punished for knowingly failing to abide by SORNA requirements, by either the state or the federal government.

Section 2250(a)(2)(A) is necessary and proper to bring about parity and a consistent level of enforcement, monitoring and tracking of all sex offenders, so that laxity toward federal sex offenders does not disrupt or interfere with Congress's enumerated powers sought to be executed through SORNA. Although § 2250(a)(2)(A) overlaps with the participating jurisdictions' criminal penalties enacted pursuant to § 16913(e), Congress evidently had reason to enact a federal criminal law to further and protect its enumerated powers brought into execution by SORNA. As the Supreme Court explained in *Carr v. United States*, "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." — U.S. —, 130 S. Ct. 2229, 2238, 176 L. Ed. 2d 1152 (2010). Congress could reasonably expect the states to have an incentive and ability to monitor, track, and convict state sex offenders who change names, residences, employment, or schools intrastate without updating their registrations, while deeming that the federal government should take primary responsibility for deterring federal sex offenders from doing the same. After all, because federal sex offenders are identified and classified as such by virtue of their federal

convictions, it is reasonable for Congress to require the federal government, rather than the participating jurisdictions, to be primarily responsible for monitoring and enforcing their registration and updating requirements under SORNA.

Congress also exercised its Commerce Clause authority to enact § 2250(a)(2)(B), which punishes sex offenders who travel in interstate commerce and evade registration requirements. No one disagrees with this use of congressional power in SORNA. Furthermore, "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce [and] the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Gonzales v. Raich*, 545 U.S. 1, 37, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (Scalia, J., concurring in the judgment). Justice Scalia's view of the Necessary and Proper Clause was adopted by five additional members of the Supreme Court, the five members of the majority in *Comstock*.[1] In *Comstock*, the Court explained that in determining whether the Necessary and Proper Clause grants Congress authority to enact a particular piece of legislation, "the relevant inquiry is simply 'whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power' or under other powers that the Constitution grants Congress the authority to implement." 130 S. Ct. at 1957

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[1] In declining to join the majority in *Comstock*, Justice Scalia did not question his prior reasoning regarding the Necessary and Proper Clause; rather, he joined Justice Thomas's dissent in *Comstock* on the ground that the statute at issue did not effectuate Congress's exercise of an enumerated power. *See Comstock*, — U.S. —, 130 S. Ct. 1949, 1970 (Thomas, J., dissenting).

(quoting *Raich*, 545 U.S. at 37, 125 S. Ct. 2195 (Scalia, J., concurring in the judgment), in turn quoting *United States v. Darby*, 312 U.S. 100, 121, 61 S. Ct. 451, 85 L. Ed. 609 (1941)).

Congress thus clearly also had the authority to enact § 16913(a)-(c), which lays out registration and updating requirements for sex offenders, and § 2250(a)(2)(A), which provides a criminal penalty for federal sex offenders who knowingly fail to comply with § 16913(a)-(c). Congress's imposition of registration and updating requirements on federal sex offenders, even if they never move to another state, is reasonably adapted to the exercise of its powers under SORNA because it is a necessary part of the comprehensive national system of SORNA that Congress enacted. Without uniform and consistent registration requirements, sex offenders could change their information or identity intrastate—for example, by changing their names or residences—decline to register such changes, and subsequently feel able to commit sex crimes and/or move to another state undetected. In so doing, they would undermine Congress's goal of establishing a nationwide, comprehensive scheme for tracking the whereabouts of sex offenders. The reasoning of other courts of appeals in cases dealing with state sex offenders is equally applicable to federal sex offenders. *See United States v. Howell*, 552 F.3d 709, 717 (8th Cir. 2009) ("Although § 16913 may reach a wholly intrastate sex offender for registry information, § 16913 is a reasonable means to track those offenders if they move across state lines. In order to monitor the interstate movement of sex offenders, the government must know both where the offender has moved and where the offender originated. Without knowing an offender's initial location, there is nothing to ensure the

government would know if the sex offender moved. The registration requirements are reasonably adapted to the legitimate end of regulating 'persons or things in interstate commerce' and 'the use of the channels of interstate commerce.'" (quoting *United States v. May*, 535 F.3d 912, 921 (8th Cir. 2008), in turn quoting *Lopez*, 514 U.S. at 558-59, 115 S. Ct. 1624) (internal quotation marks omitted)); *accord United States v. Guzman*, 591 F.3d 83, 89-91 (2d Cir. 2010) ("Requiring sex offenders to update their registrations due to intrastate changes of address or employment status is a perfectly logical way to help ensure that states will more effectively be able to track sex offenders when they do cross state lines. To the extent that § 16913 regulates solely intrastate activity, its means 'are "reasonably adapted" to the attainment of a legitimate end under the commerce power,' and therefore proper." (quoting *Raich*, 545 U.S. at 37, 125 S. Ct. 2195 (Scalia, J., concurring in the judgment))); *cf. United States v. Pendleton*, 636 F.3d 78, 87 (3d Cir. 2011), *cert. denied*, — U.S. —, 132 S. Ct. 1090, 181 L. Ed. 2d 982 (2012) (same). Section 2250(a)(2)(A) gives the federal government the complementary power to enforce SORNA's registration and updating requirements against federal sex offenders and thus reasonably adapts Congress' commerce clause power to effectuate Congress's purposes in enacting SORNA. And, as already explained, "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Carr*, 130 S. Ct. at 2238.

In sum, Congress could reasonably conclude that 18 U.S.C. § 2250(a)(2)(A) and 42 U.S.C. § 16913(a)-(c) were

"convenient, or useful" or "conducive" to the "beneficial exercise," *McCulloch*, 17 U.S. at 413, 418; *see also id.* at 421, of its legislative power, were means rationally adapted to the attainment of a legitimate end—a national comprehensive system for registering, updating, and tracking sex offenders—under the commerce power, the spending power, or under other powers that the Constitution grants Congress the authority to implement. *Comstock*, 130 S. Ct. at 1957 (citing *Raich*, 545 U.S. at 37, 125 S. Ct. 2195 (Scalia, J., concurring in the judgment), in turn quoting *Darby*, 312 U.S. at 121, 61 S. Ct. 451).

III.

The majority is also clearly in error in concluding that SORNA's provisions do not apply retroactively to Kebodeaux because he served his sentence before the enactment of SORNA on July 27, 2006. Quite to the contrary, the Act authorized the Attorney General to specify the applicability of its requirements to sex offenders convicted before its enactment. 42 U.S.C. § 16913(d); *see United States v. Johnson*, 632 F.3d 912, 922 (5th Cir. 2011) ("When SORNA was enacted, Congress elected not to decide for itself whether the Act's registration requirements—and thus § 2250(a)'s criminal penalties—would apply to persons who had been convicted of qualifying sex offenses before SORNA took effect. Instead, Congress delegated to the Attorney General the authority to decide that question."). On February 28, 2007, the Attorney General issued an interim regulation stating that SORNA's requirements "apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8897 (Feb.

28, 2007); (codified at 28 C.F.R. § 72.3). Neither SORNA nor the Attorney General's interim regulation provides any exception for released pre-act federal offenders from the retroactive application of SORNA's registration and notification requirements.

Not only does the plain language of SORNA and the Attorney General's interim regulation make SORNA's requirements retroactively applicable to Kebodeaux and all other sex offenders, regardless of the dates of their convictions or releases from custody, our prior decisions have consistently upheld SORNA against similar challenges and arguments. In *Johnson*, we reaffirmed our holdings in *United States v. Whaley*, 577 F.3d 254, 260-64 (5th Cir. 2009), that SORNA does not violate due process, exceed Congress's authority under the Commerce Clause, or exceed the non-delegation doctrine; and our holding in *United States v. Young*, 585 F.3d 199, 206 (5th Cir. 2009), that SORNA does not violate the Ex Post Facto Clause. Also, in *Johnson* itself, we rejected a challenge to the validity of the Act and the decision of the Attorney General to apply it to persons whose convictions for sex crimes predate its enactment, holding that SORNA does not violate the Tenth Amendment, and that the Attorney General's failure to comply with Administrative Procedure Act procedures prior to promulgation of the interim rule was harmless. 632 F.3d at 930-33.

IV.

In summary, after agreeing with this courts' prior decisions upholding SORNA against Ex Post Facto, Due Process, Tenth Amendment, and other attacks, the majority opinion offers no valid reason that SORNA is not a reasonable adaptation of Congress' spending power,

commerce power, and power to enact criminal laws to further and protect its enumerated powers, for the legitimate end of establishing a comprehensive national sex offender registration and notification system. Accordingly, in my view, SORNA is not unconstitutional as applied to Kebodeaux.

For these reasons I respectfully dissent.

HAYNES, Circuit Judge, joined by KING, W. EUGENE DAVIS, CARL E. STEWART and LESLIE H. SOUTHWICK, Circuit Judges, dissenting:

I respectfully dissent. I would affirm Kebodeaux's conviction.

I. *The Original Challenge*

I begin by addressing what we need no longer consider—a facial challenge to Section 2250(a)(2)(A)'s constitutionality. In the district court, Kebodeaux brought a broad-based challenge to Congress's power to enact this section at all, largely focused on Commerce Clause concerns. Before the original panel, though mentioning the impact on him, Kebodeaux again largely confined his analysis to the overall alleged unconstitutionality of this section discussing both the "necessary and proper" basis and the Commerce Clause basis. His broad assertions that Congress lacked power to provide civil collateral consequences for federally-convicted offenders engendered the panel majority's analysis of this power. Only in supplemental briefing before the en banc court did Kebodeaux's argument begin to crystallize "solely" into an "as applied" challenge. Indeed, it was not until oral argument before the en banc court that Kebodeaux's attorney finally conceded that Section 2250(a)(2)(A) could be constitutional "as applied" to cer-

tain classes of offenders, just not Kebodeaux, i.e., that Congress has a federal interest in the civil collateral consequences of federal offenses even when those civil consequences are not imposed as part of the original sentence for the offense.

The majority opinion continues in this vein, all but conceding that § 2250(a)(2)(A) is facially constitutional and declining to strike it down in its entirety, as Kebodeaux originally sought so long ago in district court. Maj. Op. at 234 [pp. 3a-4a, *supra*]. Therefore, while I continue to stand by the panel majority opinion, 647 F.3d 137 (5th Cir.), *vacated*, 647 F.3d 605 (5th Cir. 2011), I will not reprise it here (or further address the disagreements with it articulated by the majority opinion) beyond that necessary to address all that is left of the case—the as applied challenge centered on Kebodeaux. In doing so, however, I note the jurisprudential problems posed by an argument that changes from district court to panel to en banc and the relative lack of utility in deciding Kebodeaux's case alone (not to mention the "narrow" group[1] in which he falls) as an en banc court. Respecting the right of my colleagues to address the present argument alone as an en banc court, I address the "as applied" argument below.

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[1] As posited by the majority opinion, this "narrow group" presumably consists of federal sex offenders released from prison and supervised release before SORNA's enactment who do not travel in interstate commerce after its enactment.

II. *Section 2250(a)(2)(A) is Constitutional As Applied to Kebodeaux*

A. The Analytical Process

Any discussion of the constitutionality of a statute must begin with the presumption of its constitutionality. *See, e.g., United States v. Morrison*, 529 U.S. 598, 608, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). As the majority opinion notes, the analysis "always starts with a heavy thumb on the scale in favor of upholding government action." Maj. Op. at 236-37 [p. 8a, *supra*]. The basic analysis focuses on whether the challenged statute "constitutes a means that is rationally related to the implementation of a constitutionally enumerated power," *United States v. Comstock*, — U.S. —, 130 S. Ct. 1949, 1956, 176 L. Ed. 2d 878 (2010) (citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 4 L. Ed. 579 (1819), and *Sabri v. United States*, 541 U.S. 600, 605, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004)); and, that the statute must reflect a "'means . . . 'reasonably adapted' to the attainment of a legitimate end under'" an enumerated power, *id.* at 1957 (quoting *Gonzales v. Raich*, 545 U.S. 1, 37, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (Scalia, J. concurring)); *see also id.* at 1961 ("Moreover, § 4248 is 'reasonably adapted' to Congress' power to act as a responsible federal custodian (a power that rests, in turn, on federal criminal statutes that legitimately seek to implement constitutionally enumerated authority)." (citation omitted)).

Starting with a presumption of constitutionality, Congress has "broad authority" to enact laws that are rationally related to enumerated powers. *Id.* at 1957. The majority opinion is right to distinguish this inquiry from due process and equal protection rational-basis scrutiny,

but that distinction by no means lowers the high hurdle that Kebodeaux faces. *See id.* ("'The Constitution . . . leaves to Congress a large discretion as to the means that may be employed in executing a given power.'" (quoting *Lottery Case*, 188 U.S. 321, 355, 23 S. Ct. 321, 47 L. Ed. 492 (1903))); *see also Morrison*, 529 U.S. at 607, 120 S. Ct. 1740 ("[Courts may] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). Further, the *Comstock* Court outlined the sometimes distant and indirect relationship between an enumerated power and a properly enacted statute implemented in furtherance of the Necessary and Proper Clause:

> Neither Congress' power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things in the course of "carrying into Execution" the enumerated powers "vested by" the "Constitution in the Government of the United States," Art. I, § 8, cl. 18—authority granted by the Necessary and Proper Clause.

130 S. Ct. at 1958. This statement provides the framework for any Necessary and Proper Clause analysis.

With this general background in mind, I turn to the matter at hand. Perhaps much of the disagreement between the majority opinion and the panel majority opinion is in the framing of the issue. The majority opinion posits that Congress in enacting Section 2250(a)(2)(A), and the Government in prosecuting Kebodeaux under it, seek to "assert unending criminal authority" over convicted federal sex offenders. If this premise were true, I

would agree with the majority opinion that Congress has exceeded its authority—albeit under the Ex Post Facto Clause. However, because SORNA's registration requirements are civil in nature, as the majority opinion itself notes repeatedly (*see, e.g.*, Maj. Op. at 238 n.17), Congress appropriately exercised its power to prescribe civil collateral consequences of a federal crime pursuant to the Necessary and Proper Clause.

B. Even under the Majority Opinion's Test, Kebodeaux's Conviction is not Unconstitutional

The thrust of the majority opinion's analysis focuses on the "jurisdictional hook" needed for Congress to impose civil registration requirements on a prisoner convicted of a federal crime. The majority opinion concedes that Congress may place conditions on a federal prisoner's release from custody, or even impose sex-offender registration requirements on anyone under federal government supervision, even if those requirements were not expressly included as part of the prisoner's sentence. When a federal prisoner, however, is "unconditionally released," the majority opinion posits that the federal government forfeits its ability to impose civil collateral consequences for that federal crime, here, molesting a young teenager. Therefore, the majority reasons that because Kebodeaux was "unconditionally released" prior to SORNA's enactment, Congress has no authority to require him to register under the Act. Ultimately, the majority opinion contends that "SORNA's registration requirements are civil *and were enacted* after Kebodeaux committed his crime," Maj. Op. at 239 [p. 13a, *supra*] (emphasis added), and that Congress cannot "pass a law to protect society from someone who was once in prison but seven years ago had fully served his sentence and had not since been in contact with the fed-

eral government." Maj. Op. at 240 [p. 15a, *supra*]. In other words, Congress must "strike while the iron is hot."

Assuming arguendo that the majority opinion's premise is correct—that Congress must enact a civil collateral consequence statute while the particular federal offender regulated is still within the federal government's grasp—Congress did so. The federal government seized and never relinquished its registration authority over Kebodeaux from 1999 to the present. As the majority opinion concedes, "federal law relating to sex-offender registration [has existed] since 1994." Maj. Op. at 238 [p. 10a, *supra*]. All agree that Kebodeaux was convicted in 1999 of a crime committed that same year. Thus, to the extent Congress must strike while the iron is hot, I will next examine how it did so.

The premise of the majority opinion's jurisdictional analysis stems from the fact that SORNA was implemented after Kebodeaux's release, allegedly leaving a gap in jurisdiction that prevents the federal government from regulating civil consequences of his conviction pursuant to the Necessary and Proper Clause. The majority opinion and Kebodeaux (through concessions by counsel at oral argument) agree, however, that if SORNA had been implemented while Kebodeaux was in custody or subject to supervised release, then this argument would not apply.

Kebodeaux was, in fact, continuously subject to federal registration authority from the time of his release through SORNA's inception (and thereafter).[2] In 1994,

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[2] Pertinent to the conviction from this appeal is taken, Kebodeaux was aware at the time in question of the need to register as a sex of-

Congress enacted the Wetterling Act, which subjected certain sex offenders to registration requirements through a state-based registration system. *See* 42 U.S.C. § 14071, *repealed by* SORNA § 129, Pub. L. 109-248, § 129, 120 Stat. 600 (2006). The Wetterling Act required states to meet minimum requirements in order to receive federal criminal justice funds. *Id.* In 1996, Congress enacted the Pam Lychner Act, which retained the Wetterling Act's minimum ten-year registration requirement for sex offenders but expanded lifetime registration requirements to a broader swath of offenders. *See id.* § 14072, *repealed by* SORNA. The Lychner Act also enhanced federal involvement in the registration process, creating a national database designed to allow the FBI to track registrants and to provide a mechanism for registration where offenders resided in states that chose not to comply with the Wetterling Act. *Id.* In addition, the Lychner Act created a federal criminal penalty for certain offenders' failure to register. *Id.* § 14072(i); Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 72 (2008); *United States v. Smith*, 481 F. Supp. 2d 846, 847-51 (E.D. Mich. 2007) (concluding that although § 2250 did not apply to a defendant's pre-SORNA offense, defendant was subject to federal misdemeanor for failing to register pursuant to the Lychner

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fender and does not contend confusion about the need to do so after SORNA's passage. Nor does he contend some inability to comply. In this case, he stipulated that he moved from San Antonio, Texas to El Paso, Texas in August of 2007 and reported to the El Paso police department to file the necessary registration forms. At that time, he acknowledged knowledge of the registration requirements. Thereafter, he moved back to San Antonio without re-registering. That failure to register triggered the prosecution underlying this conviction.

Act).[3] The next year, the Jacob Wetterling Improvements Act extended registration requirements to certain federal and military offenders. *See* Pub. L. No. 105-277, 112 Stat. 2440; 42 U.S.C. § 14072(i).

In 1999, Kebodeaux was convicted under Article 120 of the United States Code of Military Justice for one count of carnal knowledge involving a minor. This offense invoked the Lychner Act's federal registration requirement. Section 14072(i) required registration by any person "described in section 4042(c) of title 18." 42 U.S.C. § 14072(i)(3) (effective Oct. 21, 1998 to July 26, 2009). Section 4042(c) included persons convicted of an "offense designated by the Attorney General as a sexual offense for purposes of this subsection." 18 U.S.C. § 4042(c)(4)(E), *repealed by* SORNA (effective through July 27, 2006). Accordingly, the Attorney General designated as a sexual offense for purposes of § 4042(c), the military sex offense that Kebodeaux later committed: "Uniform Code of Military Justice . . . 120B1/2 (Carnal knowledge)." 28 C.F.R. § 571.72(b)(2); *see Designa-*

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[3] *See also United States v. Torres*, 573 F. Supp. 2d 925, 932 (W.D. Tex. 2008) ("While the Act primarily was regulatory in nature, similar to SORNA, the Wetterling Act also provided criminal penalties of up to one year for a first offense, and up to ten years for subsequent offenses, for sex offenders who failed to register in any state they resided, worked or were a student."); *United States v. Hinen*, 487 F. Supp. 2d 747, (W.D. Va. 2007) ("The Jacob Wetterling Act of 1994 directly imposes registration requirements on certain classes of sex offenders, and the defendant is included within this class. . . . Regardless of the applicability of SORNA to the defendant, as of the dates in question, the nature of his conviction required him, under a long-standing federal law, to register in his state of residence and any other state where he was employed, carried on a vocation, or was a student."), *reversed on other grounds by United States v. Hatcher*, 560 F.3d 222 (4th Cir. 2009).

tion of Offenses Subject to Sex Offender Release Notification, 63 Fed. Reg. 69,386 (Dec. 16, 1998).[4]

Regardless of the state in which Kebodeaux chose to reside after his release, he was required to register for at least ten years. If he lived in a state that complied with the Wetterling Act's minimum requirements, then Kebodeaux was required to register with that state. *See* 42 U.S.C. §§ 14071(b)(6)-(7), 14072(i)(3).[5] If, however, he lived in a state that was not minimally compliant, Kebodeaux was required to register with the FBI. *Id.* § 14072(c)-(d), (g)(2), (i). At the time of his original conviction, Kebodeaux's "fail[ure] to register in [the] State in which [he] reside[d]," (or with the FBI, if he was in a non-minimally compliant state) was punishable for a first offense, of imprisonment "for not more than 1 year[6] and, in the case of a second or subsequent offense under [14072(i)], . . . not more than 10 years." *Id.*

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[4] The Department of Justice's guidance on sex-offender release notification designated "UCMJ offenses . . . [to make] clear that persons convicted of military offenses in pertinent categories are persons described in 18 U.S.C. § 4042(c)(4) for all purposes, including post-release change of address notice by federal probation officers for persons under their supervision pursuant to section 4042(c)(2)." 63 Fed. Reg. 69,386.

[5] 42 U.S.C. § 14071(b)(7) required "minimally compliant" states to establish procedures to accept registration information from residents convicted of federal offenses.

[6] Based on this section, the concurring opinion filed by Judge Owen suggests that the sentence was unconstitutional. In the briefing before our court, Kebodeaux has never separately challenged his sentence; instead, he has sought only vacatur of his conviction. This is probably because by the time his appellate brief was filed, he had already been released from confinement such that any appeal of the sentence of confinement is moot. *United States v. Rosenbaum-Alanis*, 483 F.3d 381, 382 (5th Cir. 2007).

§ 14072(i)(1), (3)-(4); *see United States v. Mantia*, No. 07-60041, 2007 WL 4730120, *1, 6 n.5 (W.D. La. Dec. 10, 2007) (unpublished).[7]

The Wetterling and Lychner Acts were folded into and repealed as stand-alone acts on July 27, 2006,[8] in an effort to further expand and unify national sex registration requirements. *Reynolds v. United States*, — U.S. —, 132 S. Ct. 975, 978, 181 L. Ed. 2d 935 (2012).[9] Until SORNA's implementation (and continuing thereafter), Kebodeaux had been continuously subject to federal registration requirements of some sort. Though Kebodeaux challenges SORNA, using the majority opinion's reasoning, the federal government never gave up—or lost—its "jurisdictional hook" over Kebodeaux. The ma-

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[7] The majority opinion's contention that Kebodeaux's residence in a minimally compliant state immunized him from federal requirements is incorrect. Maj. Op. at 235 n.4 [p. 4a n.4, *supra*]. Whether a state was minimally compliant or not affected *where* Kebodeaux was to register but not *whether* he had to register. Therefore, Kebodeaux's location in a minimally compliant state did not impact the fact that he was subject to federal penalties for failure to register. *See* 42 U.S.C. § 14072(i)(3) (applying a federal penalty to particular federal offenders that "knowingly fail[ ] to register in *any State* in which the person resides . . . " (emphasis added)).

[8] The Adam Walsh Act made clear, however, that the effective date of the repeal of predecessor registry programs would not take effect until at least July 27, 2009. *See* Pub. L. 109-248, §§ 124, 129, 120 Stat. 598, 600-01; *see also* Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38035 (July 2, 2008) (noting that the Wetterling Act would be repealed "upon completion of implementation period for SORNA").

[9] *Reynolds* addressed the narrow question of when and how SORNA's particular requirements become effective as to persons who committed their offense prior to its enactment. It does not address Congress's power to prescribe registration requirements for those offenders.

jority opinion's reasoning is based on a straightforward syllogism: The federal government loses its right to enact civil collateral consequences over a federal inmate once the inmate is unconditionally released from its supervision; Kebodeaux was released from prison before SORNA's enactment; thus, the federal government no longer had federal jurisdiction over Kebodeaux when it convicted him for failing to register under SORNA. Even if we assume for the sake of argument that the majority opinion's jurisdictional premise is correct, Congress exercised "jurisdiction" over Kebodeaux while he was still subject to federal restrictions. That one statute has been folded into another does not alter this assertion of civil "power" and "jurisdiction" over Kebodeaux as a convicted federal sex offender. Kebodeaux was always required to register under federal law; the federal government never gave up its "federal" interest in Kebodeaux as a convicted federal sex offender.

It is undisputed that SORNA revamped prior federal registration requirements. *Reynolds*, 132 S. Ct. at 978. SORNA is a broader scheme that applies to a greater number of sex offenders than the prior Acts. *See* 42 U.S.C. § 16911(5)-(8).[10] In passing it, Congress sought

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[10] SORNA was enacted to create a "comprehensive national system for the registration of sex offenders by creating a new set of standards for the states' Megan's Laws and imposing registration obligations on sex offenders. The SORNA reforms were designed to 'close potential gaps under the old law, and generally strengthen the nationwide network of sex offender registration and notification programs.'" *United States v. Simington*, 2011 WL 145326, at *3 (W.D. Tex. Jan. 14, 2011) (internal citations omitted). Assuming arguendo the correctness of the majority's analysis, the situation might be different if Kebodeaux fell in one of those "gaps" pre-SORNA that was filled by SORNA. But that's not the case.

to make prior sex offender registration schemes "more comprehensive, uniform, and effective." *Carr v. United States*, — U.S. —, 130 S. Ct. 2229, 2232, 176 L. Ed. 2d 1152 (2010). SORNA thus mandates more comprehensive registration information and stringent check-in protocols. *See id.* § 16914. Moreover, prior to SORNA's passage, initial violations of federal registration requirements only constituted a misdemeanor offense, *see* 42 U.S.C. § 14072(i), while SORNA makes failure to register a felony punishable by up to ten years in prison, *see* 18 U.S.C. § 2250. Undoubtedly, then SORNA made important changes to the scheme previously in place.

For purposes of addressing the majority opinion's analysis, however, SORNA's broad applicability compared to prior law is of no relevance. If this challenge is "as-applied," as Kebodeaux now asserts, then the crux of the matter as defined by the majority opinion is whether the federal government had asserted jurisdiction to require civil registration over Kebodeaux as a convicted federal sex offender when it had him in its grasp, not whether the two statutes are exactly congruent.[11] Because Kebodeaux was indeed subject to federal registration requirements at the time of his release from prison under the Wetterling and Lychner Acts and thereafter under SORNA, the "jurisdictional hook" is not an issue. It makes little sense to contend that Congress lost its power or "jurisdictional hook" over Kebodeaux simply because it updated the national sex-offender registration system laws.

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[11] Again assuming arguendo the validity of the majority opinion's analysis, the situation could be different if SORNA had fundamentally altered Kebodeaux's requirements by imposing some brand new obligation fundamentally different from registration. But Kebodeaux's basic requirement of registration stayed the same.

I see no reason to distinguish the jurisdiction (as a matter of federal power) exercised over Kebodeaux under SORNA from that exercised under its predecessor sex offender registry laws that applied to Kebodeaux. Therefore, if we are to assume that Kebodeaux's conviction would be constitutional had SORNA been enacted while he was in prison or on supervised release, then his conviction is constitutional given the continuous federal jurisdiction Congress exercised over Kebodeaux from the time he committed his original sex crime, through his imprisonment, at the time of his release, through SORNA's passage, and to the present day.

In sum, Congress did "strike while the iron was hot," at least as to federal sex offender Kebodeaux, who was convicted when SORNA's predecessors were in place and imposed the basic requirement to register as to which Kebodeaux later ran afoul. Kebodeaux's "as-applied" challenge, therefore, should fail, and the conviction should be affirmed. From the majority opinion's failure to do so, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-51185

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY JAMES KEBODEAUX, ALSO KNOWN AS
ANTHONY KEBODEAUX, DEFENDANT-APPELLANT

July 25, 2011

ORDER

Before: JONES, Chief Judge, and KING, JOLLY, DAVIS, SMITH, GARZA, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, HAYNES and GRAVES, Circuit Judges.

PER CURIAM:

A majority of the circuit judges in regular active service and not disqualified having voted in favor, on the Court's own motion, to rehear this case en banc.

It is ordered that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-51185

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTHONY JAMES KEBODEAUX, ALSO KNOWN AS
ANTHONY KEBODEAUX, DEFENDANT-APPELLANT

Filed: July 12, 2011

Appeal from the United States District Court for the
Western District of Texas

Before: STEWART, DENNIS and HAYNES, Circuit Judges.

PER CURIAM:

The petition for rehearing en banc, treated as a petition for panel rehearing, is GRANTED. We withdraw our prior opinion, *United States v. Kebodeaux*, 634 F.3d 293 (5th Cir. 2011), and substitute the following.

Defendant, Anthony Kebodeaux, a federally-adjudged sex offender, was convicted of knowingly failing to update his sex offender registration after his intrastate change of residence (from El Paso to San Antonio, Texas) as required by the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250(a)(2)(A) and 42 U.S.C. § 16913. He was sentenced to twelve months and one day of imprisonment.

On appeal, he argues that the Constitution does not grant Congress the authority to enact § 2250(a)(2)(A), read together with § 16913, because that provision regulates purely intrastate activities, rather than any aspect of Congress's proper domain of interstate commerce—and that no other Article I source of authority permits Congress to impose SORNA's registration and notification obligations on him. We conclude that § 2250(a)(2)(A) is constitutional.

BACKGROUND

In 1999, Kebodeaux, a twenty-one-year-old member of the United States Air Force, was convicted under Article 120 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 920, of Carnal Knowledge With a Child, and sentenced to three months of confinement and a bad conduct discharge. The victim was a fifteen-year-old with whom Kebodeaux had sexual relations to which the victim assented in fact though she lacked the legal ability to consent. Kebodeaux served his sentence and was discharged from the military. No term of supervised release was imposed.

On August 8, 2007, Kebodeaux registered as a sex offender in El Paso, Texas, and reported his residence at a street address in that city, in compliance with SORNA. *See* 42 U.S.C. § 16913. On January 24, 2008, El Paso police were unable to locate Kebodeaux at that address. On March 12, 2008, Kebodeaux was found and arrested in San Antonio, Texas. Kebodeaux admits that he did not update his registration or otherwise inform authorities of his relocation from El Paso to San Antonio as re-

quired by SORNA.[1] On April 2, 2008, a federal grand jury indicted Kebodeaux on one count of violation of SORNA, 18 U.S.C. § 2250(a).

Section 2250(a) makes it a crime punishable by up to ten years imprisonment if a person who:

> (1) is required to register under [SORNA];
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> (2) (A) is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law (including the [UCMJ]), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by [SORNA].

Thus, "Section 2250 imposes criminal liability on two categories of persons who fail to adhere to SORNA's registration [and updating] requirements: any person who is a sex offender 'by reason of a conviction under Federal law, the law of the District of Columbia, Indian

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[1] 42 U.S.C. § 16913(a) provides: "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence." 42 U.S.C. § 16913(c) also provides, "A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register."

tribal law, or the law of any territory or possession of the United States', § 2250(a)(2)(A), and any other person required to register under SORNA who 'travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country,' § 2250(a)(2)(B)." *Carr v. United States*, — U.S. —, 130 S. Ct. 2229, 2238, 176 L. Ed. 2d 1152 (2010) (alteration removed). Accordingly, "[f]or persons convicted of sex offenses under federal or Indian tribal law, interstate travel is not a prerequisite to § 2250 liability." *Id.* at 2235 n.3 (citing § 2250(a)(2)(A)).

In response to Kebodeaux's pre-trial filings, the Government stated that it was charging Kebodeaux solely because he fell under 18 U.S.C. § 2250(a)(2)(A), as he qualified as a sex offender "for the purpose of" SORNA "by reason of a conviction under . . . the [UCMJ]" and knowingly failed to update his registration when he moved intra-state, within Texas.[2] After a bench trial on the stipulated facts described above, Kebodeaux was convicted and subsequently sentenced below the Sentencing Guidelines recommendation to twelve months and one day of imprisonment, with a five-year term of supervised release. Kebodeaux timely appeals the constitutionality of his conviction and sentence.

DISCUSSION

We review challenges to the constitutionality of a conviction *de novo*. *United States v. Whaley*, 577 F.3d 254, 256 (5th Cir. 2009).

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[2] The Government also stated that it was not charging Kebodeaux under § 2250(a)(2)(B), for having traveled in interstate or foreign commerce or having entered an Indian reservation and knowingly having failed to update his registration.

Kebodeaux narrowly focuses his challenge exclusively on § 2250(a)(2)(A)'s punishment of a federal sex offender—who has previously registered under SORNA—for knowingly failing to update his registration after an intrastate relocation in violation of the registration requirement imposed by § 16913. He concedes the constitutional validity of the balance of SORNA's provisions.

We must begin any assessment of the constitutionality of a duly-enacted federal statute with a "presumption of constitutionality." *United States v. Morrison*, 529 U.S. 598, 607, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000). This presumption itself is grounded in the Constitution: "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *Id.* We remain, of course, mindful that in some cases a party will succeed in making this "plain showing," and that in those cases it is our obligation to declare the law unconstitutional. *Cf. Morrison*, 529 U.S. at 616, 627, 120 S. Ct. 1740 (holding part of the Violence Against Women Act outside Congress's authority to enact); *United States v. Lopez*, 514 U.S. 549, 567-68, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (holding the Gun-Free School Zones Act unconstitutional).

Along these lines, we note that we do not write on a blank slate as to SORNA, as it has withstood constitutional scrutiny on a number of fronts in the years since its enactment. Our court has previously held that, as applied to sex offenders who traveled across state lines, § 16913, taken together with § 2250(a)(2)(B), does not run afoul of the Commerce Clause, *United States v. Whaley*, 577 F.3d 254, 258 (5th Cir. 2009), the Due Process Clause, *id.* at 262, or the non-delegation doctrine,

id. at 264. We have also held that SORNA comports with the requirements of the Ex Post Facto Clause because "the forbidden *act* [viz., failure to register] is not one which was legal at the time [the appellant] committed it." *United States v. Young*, 585 F.3d 199, 203-04 (5th Cir. 2009); *see also Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (holding Alaska's state sex offender statute did not run afoul of the Ex Post Facto Clause because the law was "a regulatory scheme that is civil and nonpunitive" in intention and in fact). We have rejected challenges to the application of SORNA under the Due Process Clause where the involved states maintained sex offender registries but had not formally implemented SORNA. *United States v. Heth*, 596 F.3d 255, 259 (5th Cir. 2010). We also have held that SORNA does not "compel the States to enact or enforce a federal regulatory program" in violation of the Tenth Amendment. *United States v. Johnson*, 632 F.3d 912, 920 (5th Cir. 2011) (quoting *Printz v. United States*, 521 U.S. 898, 935, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997)), *petition for cert. filed*, No. 10-10330 (U.S. filed May 3, 2011).[3] Furthermore, no other circuit has

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[3] We have moreover reiterated and reaffirmed each of these holdings in a range of unpublished cases. *See United States v. Byrd*, No. 09-51108, 2011 WL 990304, at *4-5, 2011 U.S. App. LEXIS 5962, at *10-12 (5th Cir. Mar. 22, 2011) (following *Heth* and *Whaley*); *United States v. Koch*, 403 Fed. Appx. 917, 917 (5th Cir. 2010) (following *Whaley*); *United States v. Ross*, 385 Fed. Appx. 364, 365 (5th Cir. 2010) (following *Heth* and *Whaley*), *cert. denied*, — U.S. —, 131 S. Ct. 583, 178 L. Ed. 2d 425 (2010); *United States v. Marrufo*, 381 Fed. Appx. 403, 404-05 (5th Cir. 2010) (following *Heth* and *Whaley*); *United States v. Contreras*, 380 Fed. Appx. 434, 435-36 (5th Cir. 2010) (following *Heth* and *Whaley*); *United States v. McBroom*, No. 09-50443, 2010 U.S. App. LEXIS 11113, at *3-4 (5th Cir. June 1, 2010) (following *Heth* and *Whaley*), *cert. denied*, — U.S. —, 131 S. Ct. 484, 178

held any portion of SORNA unconstitutional,[4] and the few district courts that have rejected any part of SORNA as unconstitutional have all been reversed or overruled on the merits. *See, e.g., United States v. Waybright*, 561 F. Supp. 2d 1154, 1168 (D. Mont. 2008), *overruled by United States v. George*, 625 F.3d 1124, 1129 n.2 (9th Cir. 2010); *United States v. Powers*, 544 F. Supp. 2d 1331, 1336 (M.D. Fla. 2008), *rev'd*, 562 F.3d 1342, 1344 (11th Cir. 2009) (per curiam); *United States v. Guzman*, 582 F. Supp. 2d 305, 315 (N.D.N.Y. 2008), *rev'd*, 591 F.3d 83, 89-91 (2d Cir. 2010), *cert. denied*, — U.S. —, 130 S. Ct. 3487, 177 L. Ed. 2d 1080, 1081 (2010); *United States v. Hall*, 577 F. Supp. 2d 610, 623 (N.D.N.Y. 2008), *rev'd sub nom. United States v. Guzman*, 591 F.3d at 89-91.

Of these various cases upholding SORNA, the Ninth Circuit's decision in *George* is the one that directly addressed the issue presented by this appeal. The Ninth

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L. Ed. 2d 306 (2010); *United States v. Slater*, 373 Fed. Appx. 526, 527 (5th Cir. 2010) (following *Young*); *United States v. Knezek*, No. 09-50438, 2010 WL 1655321, at *1, 2010 U.S. App. LEXIS 8585, at *2-3 (5th Cir. Apr. 26, 2010) (following *Heth* and *Whaley*); *United States v. Letourneau*, 342 Fed. Appx. 24, 26-27 (5th Cir. 2009) (following *Whaley*), *cert. denied*, — U.S. —, 130 S. Ct. 1736, 176 L. Ed. 2d 214 (2010); *United States v. Puente*, 348 Fed. Appx. 76, 77 (5th Cir. 2009) (following *Whaley*), *cert. denied*, — U.S. —, 130 S. Ct. 1747, 176 L. Ed. 2d 219 (2010).

[4] The Ninth Circuit had held that one portion of the regulations issued by the Attorney General under SORNA posed an Ex Post Facto Clause problem as to the narrow category of federally-adjudicated juvenile delinquents. *See United States v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010). The Supreme Court, however, recently vacated that decision on mootness grounds without reaching the merits of the Ninth Circuit's ruling. *United States v. Juvenile Male*, No. 09-940, 2011 WL 2518925, at *3 (U.S. June 27, 2011).

Circuit held that Congress acted within its powers, explaining that "SORNA's registration requirements in [§ 2250(a)(2)(A)] are valid based on the federal government's 'direct supervisory interest' over federal sex offenders." 625 F.3d at 1130 (quoting *Carr*, 130 S. Ct. at 2239).[5] While *George*, of course, does not bind us, "[w]e are always chary to create a circuit split," *Alfaro v. Comm'r*, 349 F.3d 225, 229 (5th Cir. 2003), absent a "persuasive reason" for doing so, *United States v. Adam*, 296 F.3d 327, 332 (5th Cir. 2002).

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[5] The district courts that have considered the question have likewise consistently held that § 2250(a)(2)(A) is constitutional. *See United States v. Morales*, 258 F.R.D. 401, 406 (E.D. Wash. 2009), *appeal docketed*, No. 09-30344 (9th Cir. filed Sept. 23, 2009); *United States v. Thompson*, 595 F. Supp. 2d 143, 145-46 (D. Me. 2009), *aff'd on other grounds*, No. 09-1946, 2011 WL 2163601, 2011 U.S. App. LEXIS 11408 (1st Cir. June 3, 2011) (unpublished); *United States v. Yelloweagle*, No. 08-cr-364, 2008 WL 5378132, at *1-2, 2008 U.S. Dist. LEXIS 105479, at *3-5 (D. Colo. Dec. 23, 2008), *aff'd on other grounds*, No. 09-1247, 2011 WL 1632095, 2011 U.S. App. LEXIS 8934 (10th Cir. May 2, 2011); *United States v. Santana*, 584 F. Supp. 2d 941, 946-47 (W.D. Tex. 2008), *appeal docketed*, No. 08-51226 (5th Cir. filed Dec. 5, 2008); *United States v. Reeder*, No. EP-08-CR-977, 2008 WL 4790114, 2008 U.S. Dist. LEXIS 105968 (W.D. Tex. Oct. 31, 2008), *appeal docketed*, No. 08-51212 (5th Cir. filed Nov. 26, 2008); *United States v. Torres*, 573 F. Supp. 2d 925, 935-36 (W.D. Tex. 2008), *appeal docketed*, No. 09-50204 (5th Cir. filed Mar. 16, 2009); *United States v. Senogles*, 570 F. Supp. 2d 1134, 1147 (D. Minn. 2008); *see also United States v. David*, No. 1:08-cr-11, 2008 WL 2045830, at *8-9, 2008 U.S. Dist. LEXIS 38613, at *26 n.11 (W.D. N.C. May 12, 2008) (suggesting that § 2250(a)(2)(A) is constitutional in dicta), *aff'd*, 333 Fed. Appx. 726 (4th Cir. 2009) (unpublished); *United States v. Voice*, 621 F. Supp. 2d 741, 760 (D.S.D. 2009) (holding that a sex offender convicted under federal law in Indian country and then residing in Indian country could be constitutionally convicted under § 2250(a)(2)(A)), *aff'd*, 622 F.3d 870 (8th Cir. 2010), *cert denied*, — U.S. —, 131 S. Ct. 1058, 178 L. Ed. 2d 875 (2011).

Kebodeaux thus faces a high, though not insurmountable, hurdle to reversal: he must overcome the presumption of constitutionality we accord a federal statute and convince us to create a circuit split. In our assessment, Kebodeaux has not cleared this bar.

The arguments that Kebodeaux made in support of his position to the district court and in his initial briefing to our court focused on the Commerce Clause. As discussed above, SORNA makes it a federal offense, through § 2250(a)(2)(B), for a sex offender convicted under state or federal law to knowingly fail to update his SORNA registration after traveling in interstate commerce. This court and others have consistently held that § 2250(a)(2)(B) is a constitutional execution of Congress's power to regulate the channels of, and persons in, interstate commerce.[6] Kebodeaux does not question those holdings or the constitutionality of § 2250(a)(2)(B). He argues only that § 2250(a)(2)(A) is unconstitutional because it is an invalid attempt by Congress to regulate intrastate activities, rather than interstate commerce.

Kebodeaux's argument ignores the fact that § 2250(a)(2)(A) does not depend on the "interstate commerce" jurisdictional hook. That subsection expressly deals with persons convicted under federal sex offender statutes and is conspicuously lacking the interstate travel element of § 2250(a)(2)(B); this distinction is plainly intentional, *see Carr*, 130 S. Ct. at 2238. Federal sex offender statutes themselves are promulgated under

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[6] *Whaley*, 577 F.3d at 258; *accord George*, 625 F.3d at 1129-30; *Guzman*, 591 F.3d at 90; *United States v. Gould*, 568 F.3d 459, 470-72 (4th Cir. 2009), *cert. denied*, — U.S. —, 130 S. Ct. 1686, 176 L. Ed. 2d 186 (2010); *United States v. Ambert*, 561 F.3d 1202, 1210-11 (11th Cir. 2009); *United States v. May*, 535 F.3d 912, 921-22 (8th Cir. 2008).

various provisions of Article I. *See, e.g.*, 18 U.S.C. § 2243(a) (criminalizing "sexual abuse of a minor or ward" in United States "special maritime and territorial jurisdiction", pursuant to Congress's Article I power "[t]o define and punish . . . felonies committed on the high seas"). In the present case, Congress had the authority to enact Article 120 of the UCMJ, criminalizing sexual abuse of a minor by a member of the military, pursuant to its power to regulate the military under Article I, Section 8, Clause 14 of the United States Constitution.[7] Kebodeaux does not suggest that Congress lacked the authority to criminalize the conduct of which he was convicted or that the statute under which he was convicted was unconstitutional.

The question then becomes whether Congress's power over federal sex offenses stretches far enough to encompass a registration requirement. The Necessary and Proper Clause of the Constitution gives Congress the power "[t]o make all laws which shall be necessary and proper for carrying into Execution" the enumerated powers. U.S. CONST., art. I, § 8, cl. 18. Our analysis of this issue is governed by *United States v. Comstock*, — U.S. —, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010).

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[7] To the extent that the UCMJ applies to members of the National Guard when engaged in certain functions in federal service, *see* 10 U.S.C. § 802(a)(3), Article 120 likely also derives from Article I, § 8, clause 16, which authorizes laws "for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." In any event, as applied to Kebodeaux, at the time of his conviction a member of the regular armed forces of the United States, the relevant source of authority is clause 14.

In *Comstock*, the Court held constitutional a civil commitment statute for sexually-dangerous federal prisoners, 18 U.S.C. § 4248, under the Necessary and Proper Clause. *Id.* at 1954. The Court pointed to "five considerations" that supported the conclusion that the statute was constitutional:

> (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.

Id. at 1965. These five considerations must be part of our assessment here, but we note at the outset that these "considerations" are not factors to be balanced or that may cut for or against the constitutionality of a statute but rather an articulation of every reason supporting the Court's conclusion that the civil commitment at issue in *Comstock* was constitutional. *Comstock* does not require that every one of these considerations be present in every case, nor does *Comstock* in any respect purport to overrule the Court's prior decisional law. Rather, *Comstock* demonstrates the distillation and application of existing law under the Necessary and Proper Clause to a particular statute.

As *Comstock* and the cases on which it relies make clear, two of the considerations—the first and third—are and have long been required in every case decided under the Necessary and Proper Clause: first, that the challenged statute must "constitute[ ] a means that is rationally related to the implementation of a constitution-

ally enumerated power," *id.* at 1956 (citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 4 L. Ed. 579 (1819), and *Sabri v. United States*, 541 U.S. 600, 605, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004)); and, second, that the statute must similarly reflect a " 'means . . . "reasonably adapted" to the attainment of a legitimate end under' " an enumerated power, *id.* at 1957 (quoting *Gonzales v. Raich*, 545 U.S. 1, 37, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (Scalia, J., concurring) (quoting *United States v. Darby*, 312 U.S. 100, 121, 61 S. Ct. 451, 85 L. Ed. 609 (1941))); *see also id.* at 1961 ("Moreover, § 4248 is 'reasonably adapted' to Congress' power to act as responsible federal custodian (a power that rests, in turn, on federal criminal statutes that legitimately seek to implement constitutionally enumerated authority." (quoting *Darby*, 312 U.S. at 121, 61 S. Ct. 451))). The remaining three considerations addressed in *Comstock* further inform rather than define the inquiry. *See, e.g., id.* at 1959 ("We recognize that even a longstanding history of related federal action does not demonstrate a statute's constitutionality. A history of involvement, however, can nonetheless be 'helpful in reviewing the substance of a congressional statutory scheme.' " (internal citations omitted) (quoting *Raich*, 545 U.S. at 21, 125 S. Ct. 2195)).

We thus address the fundamental inquiry under the Necessary and Proper Clause, that is, the first and third *Comstock* factors: is the challenged statute rationally related to an enumerated power and reasonably adapted to serve that end? On these questions, the Supreme Court's decision in *Carr* offers, as the Ninth Circuit noted in *George*, useful guidance. In explaining why § 2250(a)(2)(B) should be read differently from § 2250(a)(2)(A), the Court held that

> Congress . . . chose to handle federal and state sex offenders differently. There is nothing "anomal[ous]" about such a choice. To the contrary, it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision. It is similarly reasonable for Congress to have given the States primary responsibility for supervising and ensuring compliance among state sex offenders and to have subjected such offenders to federal criminal liability only when, after SORNA's enactment, they use the channels of interstate commerce in evading a State's reach.
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> . . .
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> . . . Congress in § 2250 exposed to federal criminal liability, with penalties of up to 10 years' imprisonment, persons required to register under SORNA over whom the Federal Government has a direct supervisory interest or who threaten the efficacy of the statutory scheme by traveling in interstate commerce.

130 S. Ct. at 2238-39; *see also George*, 625 F.3d at 1130 (quoting *Carr*, 130 S. Ct. at 2238, 2239). This quotation from *Carr*[8] thus suggests that § 2250(a) makes SORNA

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[8] As quoted above, the prior paragraph to this sentence refers to federal prisoners "who typically *would have spent time* under federal criminal supervision." *Id.* at 2238 (emphasis added). *Carr* therefore does not distinguish between the federal government's interest in current and former prisoners; to the contrary, this language suggests that past federal criminal supervision can still be a basis for a suffi-

applicable two categories of sex offenders for two distinct reasons: (1) state offenders who move across state lines and thus threaten to undermine the sex offender registration laws that every state has enacted, and (2) federal offenders—not because of any federal concern about their impact on or relationship to the nationwide registration scheme, but rather because of the distinct consideration of "the Federal Government['s] direct supervisory interest" over former federal prisoners. *Id.* at 2239.[9] This logic traces the authority for § 2250, in Kebodeaux's case, through the Necessary and Proper Clause back ultimately to the power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST., art. I, § 8, cl. 14. That is, inasmuch as Congress had the power to enact Article 120 of the UCMJ, Congress also has

> the additional power to imprison people who violate th[at] . . . law[ ], and the additional power to provide for the safe and reasonable management of those prisons, and the additional power to regulate the prisoners' behavior even after their release. Of course, each of those powers, like the powers addressed in *Sabri*, *Hall*, and *McCulloch*, is ultimately "derived from" an enumerated power.

Comstock, 130 S. Ct. at 1964 (quoting *United States v. Hall*, 98 U.S. 343, (8 Otto) 345 (1879)).

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cient present interest to permit the registration requirement at issue here.

[9] The language in *Carr* concerning § 2250(a)(2)(A) is not strictly part of the binding holding of the Court's opinion, but we are nevertheless hesitant to discard wholesale any portion of a recent Supreme Court decision discussing this very statute.

Kebodeaux argues that *Comstock*'s endorsement of Congress's "power to regulate prisoners' behavior even after their release," *id.*, refers only to the power to authorize probation and supervised release as part of a criminal sentence; he then contends that these powers are different in kind from the obligations imposed under SORNA because they are imposed at the time of the criminal judgment. This purported distinction conflates the question of the Article I power to impose an obligation with that of the limitations that the Ex Post Facto Clause, U.S. CONST., art. I, § 9, cl. 3,[10] interposes. To be a permissible exercise of Congress's powers, a law must of course both be authorized under Article I, § 8, and not be prohibited under Article I, § 9, or the various other provisions of and amendments to the Constitution that pose substantive limits on Congress's power. *See Comstock*, 130 S. Ct. at 1956 ("The question presented is whether the Necessary and Proper Clause, Art. I, § 8, cl. 18, grants Congress authority sufficient to enact the statute before us. In resolving that question, we assume, but we do not decide, that other provisions of the Constitution—such as the Due Process Clause—do not prohibit [the law at issue]."). Supervised release must be imposed as part of criminal judgment because it is punitive, but our precedent holds—following the Supreme Court—that the minimal reporting requirements

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[10] As we noted in *Young*, there are in fact two clauses barring the federal government as well as the states "from enacting any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed . . . . '" 585 F.3d at 202 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26, 18 L. Ed. 356 (1867)). Article I, § 9, clause 3, is the clause that restricts the federal government's power.

under SORNA are *not* punitive within the meaning of the Ex Post Facto Clause. *Young*, 585 F.3d at 202-06 (citing *Smith*, 538 U.S. at 95, 123 S. Ct. 1140). Both, however, are post-release regulations of the behavior of former federal prisoners and derive from the same source of authority as an Article I, § 8 matter. That is, no one contests that Congress may impose some post-release obligations on a federal prisoner; this case simply presents the question of whether the fact that those regulations are, as SORNA's are, non-punitive, civil collateral consequences—and thus not subject to Ex Post Facto Clause limitations—weakens that authority to the point of unconstitutionality. Kebodeaux offers no authority that it does, and we hold that it does not.

This analysis converges with the fifth *Comstock* consideration, the narrow scope of the challenged statute. That is, we need not "fear that our holding today confers on Congress a general 'police power, which the Founders denied the National Government and reposed in the States.'" *Comstock*, 130 S. Ct. at 1964 (quoting *Morrison*, 529 U.S. at 618, 120 S. Ct. 1740). SORNA applies only to narrow, specific class of federal offenders who Congress has concluded present a high risk to the public—and imposes only them the non-punitive obligation that they provide basic registration information to state and local governments.[11] The law does not draw within

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[11] We recognize that SORNA is not as narrow in the scope of its application as is § 4248, *see Comstock*, 130 S. Ct. at 1964-65 (explaining that the law had only been applied to civilly commit 105 sexually-dangerous persons, and that the law did not extend to persons wholly released from federal custody), but the limited nature of the obligations SORNA imposes—notification and registration—contrasts sharply with the indefinite civil commitment in a Bureau of Prisons

its sweep all persons convicted of federal crimes, and it does not impose significant burdens on those to whom it applies. We need not, that is, even decide the question of whether Congress may permissibly establish non-punitive collateral consequences for all federal crimes—only sex offenses; and we may rely on the Ex Post Facto Clause to provide a separate outer boundary on the kinds of obligations that Congress may require. In short, this limited extension of federal authority is unlikely to devolve into the general police power that the Supreme Court has repeatedly cautioned does not rest with the federal government.

Turning to the second *Comstock* consideration—the history of federal action in the arena, we agree that federal sex offender registration laws are of relatively recent vintage. *See Carr*, 130 S. Ct. at 2232 (noting that federal sex offender registration laws date to 1994). However, we do not consider that "relatively recent vintage" to be dispositive, and the Court in *Comstock* did not make it so.

The fourth consideration, the extent of the statute's accommodation of state interests, is addressed to some degree by our opinion in *Johnson*. We held there that SORNA as a whole poses no Tenth Amendment problem because the law imposes no actual mandate on the states: "While SORNA orders sex offenders traveling interstate to register and keep their registration current, SORNA does not *require* the States to comply with its directives. Instead, the statute allows jurisdictions to decide whether to implement its provisions or lose ten percent of their federal funding otherwise allocated for

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mental health facility that § 4248 authorizes so as to counterbalance SORNA's more expansive reach.

criminal justice assistance." 632 F.3d at 920 (citing 42 U.S.C. § 16925(a)). By affording states the option to decline to comply with the law's specific requirements, SORNA provides some accommodation of state interests. Further, the subsection in question addresses the federal interest in a *federal* convict. *See George*, 625 F.3d at 1130.

We therefore read *Comstock* and *Carr* as supporting our holding that Congress had the authority under Article I of the Constitution to devise a narrow, non-punitive collateral regulatory consequence to this particular high-risk category of federal criminal convictions. Kebodeaux has failed to make the "plain," *Morrison*, 529 U.S. at 607, 120 S. Ct. 1740, and "persuasive," *Adam*, 296 F.3d at 332, showing we demand before overturning the considered judgment of the legislative and executive branches of the federal government and departing from that of the remainder of the judicial branch.

CONCLUSION

Accordingly, we conclude that § 2250(a)(2)(A)'s application to intra-state violations of SORNA by sex offenders convicted under federal law is constitutional. The judgment of the district court is AFFIRMED.

DENNIS, Circuit Judge, concurring in the judgment and assigning reasons:

Defendant Anthony Kebodeaux, a federally-adjudged sex offender, was convicted of knowingly failing to update his sex offender registration after his intra-state change of residence (from El Paso to San Antonio, Texas) as required by the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250(a)(2)(A) and 42 U.S.C. § 16913. He was sentenced to twelve

months and one day of imprisonment. On appeal, he argues that the Constitution does not grant Congress the authority to enact § 2250(a)(2)(A) because that provision regulates purely intra-state activities, rather than any aspect of Congress's proper domain of interstate commerce. I conclude, however, that § 2250(a)(2)(A) is constitutional because it is not a stand-alone statute, but is part of SORNA and necessary to make SORNA effective in regulating the channels of, and persons in, interstate commerce.

Under § 2250(a)(2)(B), SORNA makes it a federal offense for a sex offender convicted under state or federal law to knowingly fail to update his SORNA registration after traveling in interstate commerce. This court and others have consistently held that § 2250(a)(2)(B) is a constitutional execution of Congress's power to regulate the channels of, and persons in, interstate commerce.[1] Kebodeaux does not question those holdings or the constitutionality of § 2250(a)(2)(B). He argues only that § 2250(a)(2)(A), in isolation, is unconstitutional because it is an invalid attempt by Congress to regulate intra-state activities, rather than interstate commerce.

Kebodeaux's challenge is without merit because § 2250(a)(2)(A) is an integral part of SORNA, rather than a stand-alone provision, and, as such, it is a constitutional regulation of intra-state activities that is necessary and proper to make SORNA, particularly § 2250(a)(2)(B), effective as a regulation of interstate

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[1] *United States v. Whaley*, 577 F.3d 254, 258 (5th Cir. 2009); *accord United States v. Guzman*, 591 F.3d 83, 90 (2d Cir. 2010); *United States v. Gould*, 568 F.3d 459, 470-72 (4th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202, 1210-11 (11th Cir. 2009); *United States v. May*, 535 F.3d 912, 921-22 (8th Cir. 2008).

commerce. As structured, SORNA is designed to "address the deficiencies in prior law that had enabled sex offenders to slip through the cracks" by moving interstate.[2] It recognizes that "'every state ha[s] enacted some' type of [sex offender] registration system"[3] and that "Congress . . . conditioned certain federal funds on States' adoption of 'criminal penalties' on any person 'required to register under a State program . . . who knowingly fails to so register and keep such registration current.'"[4] In this manner, SORNA gave "the States primary responsibility for supervising and ensuring compliance among state sex offenders."[5] Through § 2250(a)(2)(B), however, it "exposed to federal criminal liability . . . persons required to register under SORNA . . . who threaten the efficacy of the statutory scheme by traveling in interstate commerce."[6] Moreover, Congress did not delegate to the states the additional responsibility of prosecuting sex offenders convicted under federal law who fail to update their registrations after in-state residence changes. Rather, SORNA makes such an intra-state re-registration failure a federal offense amenable to prosecution by the

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[2] *Carr v. United States*, — U.S. —, 130 S. Ct. 2229, 2240, 176 L. Ed. 2d 1152 (2010) (also quoting 42 U.S.C. § 16901 as stating, "'Congress in this chapter establishes a comprehensive national system for the registration of [sex] offenders'" (alteration in original)).

[3] *Id.* at 2239 n.7 (alteration omitted) (quoting *Smith v. Doe*, 538 U.S. 84, 90, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003)).

[4] *Id.* at 2238-39 (second alteration in original) (quoting Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. 103-322, tit. XVII, § 170101(c), 108 Stat. 2041 (1994) (codified at 42 U.S.C. § 14071(d))).

[5] *Id.* at 2238.

[6] *Id.* at 2239.

federal government. Accordingly, § 2250(a)(2)(A) helps to make SORNA's regulation of interstate commerce effective by obviating potential sources of interference or disruption of that objective. For example, had Congress not criminalized federal sex offenders' undocumented, intra-state residence changes, there would be no deterrence to their moving intra-state without re-registering. This would have caused disparate and delayed enforcement of SORNA against federal sex offenders, allowing them to establish residences in some states as apparent law abiders, which would have made them difficult to monitor either in-state or in interstate commerce.

I.

On April 2, 2008, a federal grand jury indicted Kebodeaux on one count of violating SORNA, 18 U.S.C. § 2250(a).[7] Section 2250(a) provides for up to ten years' imprisonment for:

> Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;

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[7] 42 U.S.C. § 16913(a) requires, "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence." 42 U.S.C. § 16913(c) also provides, "A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register."

> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act.

Thus, "Section 2250 imposes criminal liability on two categories of persons who fail to adhere to SORNA's registration [and updating] requirements: any person who is a sex offender 'by reason of a conviction under Federal law, the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States,' § 2250(a)(2)(A), and any other person required to register under SORNA who 'travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country,' § 2250(a)(2)(B)." *Carr v. United States*, — U.S. —, 130 S. Ct. 2229, 2238, 176 L. Ed. 2d 1152 (2010) (alteration omitted). Accordingly, "[f]or persons convicted of sex offenses under federal or Indian tribal law, interstate travel is not a prerequisite to § 2250 liability." *Id.* at 2235 n.3 (citing § 2250(a)(2)(A)).

Kebodeaux narrowly focuses his challenge exclusively on § 2250(a)(2)(A)'s punishment of a federal sex offender for knowingly failing to update his registration after an intra-state relocation. He concedes the constitutional validity of the balance of SORNA's provisions.

II.

Yet, as the Supreme Court recently explained in *Carr v. United States*—holding that "[l]iability under § 2250[(a)(2)(B)] . . . cannot be predicated on pre-SORNA travel," 130 S. Ct. at 2233—"Section 2250 is not a stand-alone response to the problem of missing sex offenders; it is embedded in [the] broader statutory scheme" of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, which was "enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks" of state-based sex offender registration systems. *Carr*, 130 S. Ct. at 2240 (also quoting 42 U.S.C. § 16901 for the proposition that "'Congress in this chapter establishes a comprehensive national system for the registration of [sex] offenders'" (alteration in original)); *see also, e.g., United States v. Whaley*, 577 F.3d 254, 259 (5th Cir. 2009) ("SORNA[ ] focus[es] on the problem of sex offenders escaping their registration requirements through interstate travel . . . . "); *United States v. Ambert*, 561 F.3d 1202, 1212 (11th Cir. 2009) (Congress enacted SORNA "to create an interstate system to counteract the danger posed by sex offenders who slip through the cracks or exploit a weak state registration system by traveling or moving to another state without registering therein.'" (citing 42 U.S.C. § 16901)).

Accordingly, in *Carr*, the Supreme Court described how SORNA's various sections work together to further the joint state-federal goals of comprehensive identification and registration of all state and federal sex offenders and punishing those who knowingly avoid updating their registrations:

> Among its many provisions, SORNA instructs States to maintain sex-offender registries that compile an array of information about sex offenders, [42 U.S.C.] § 16914; to make this information publicly available online, § 16918; to share the information with other jurisdictions and with the Attorney General for inclusion in a comprehensive national sex-offender registry, §§ 16919-16921; and to "provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter," § 16913(e). Sex offenders, in turn, are required to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student," § 16913(a), and to appear in person periodically to "allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered," § 16916.

Carr, 130 S. Ct. at 2240-41. The Court continued, "By facilitating the collection of sex-offender information and its dissemination among jurisdictions, these provisions, not § 2250, stand at the center of Congress' effort to account for missing sex offenders." *Id.* at 2241. Therefore, 28 U.S.C. § 2250(a)(2)(A), a subsection of that same statute, clearly was not enacted as a stand-alone provision, but rather as a complement to the Act's other provisions. *Cf. Whaley*, 577 F.3d at 259 (stating that § 2250 is "complementary" to SORNA's registration requirements in § 16913 (citing *United States v. Dixon*, 551 F.3d 578, 582 (7th Cir. 2008))).

III.

The Necessary and Proper Clause of the Constitution gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers. U.S. Const. art. 1, § 8, cl. 18. Specifically, in respect to effectuating the Commerce Clause power, the Supreme Court has explained that the Necessary and Proper Clause provides Congress the authority to enact "comprehensive legislation to regulate the interstate market" even when that "regulation ensnares some purely intrastate activity." *Gonzales v. Raich*, 545 U.S. 1, 22, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). In *Raich*, the Court held that under the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 et seq., through the Necessary and Proper Clause power to effectuate the Commerce Clause authority, Congress could regulate the intra-state production of marijuana as "Congress could have rationally concluded that the aggregate impact on the national market of all the" regulated intra-state activities "is unquestionably substantial." 545 U.S. at 32, 125 S. Ct. 2195.

In *Raich*, Justice Scalia concurred in the judgment and wrote separately to explain that, although he "agree[d] with the Court's holding that the [CSA] may validly be applied to respondents' [intra-state] cultivation, distribution, and possession of marijuana for personal, medicinal use," his "understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced." *Id.* at 33, 125 S. Ct. 2195 (Scalia, J., concurring in the judgment). He explained that the combination of the Necessary and Proper Clause power and the Commerce Clause authority means that "Congress's authority to enact laws necessary and proper for the regulation

of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce . . . . [Congress can] regulate[ ] [non-economic activities] as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" *Id.* at 36, 125 S. Ct. 2195 (quoting *United States v. Lopez*, 514 U.S. 549, 561, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995)). "The relevant question is simply whether the means chosen are '*reasonably adapted*' to the attainment of a legitimate end under the commerce power." *Id.* at 37, 125 S. Ct. 2195 (emphasis added) (quoting *United States v. Darby*, 312 U.S. 100, 121, 61 S. Ct. 451, 85 L. Ed. 609 (1941)).

Justice Scalia based his interpretation on a long line of Supreme Court precedents. *Id.* at 34, 125 S. Ct. 2195 (citing *Katzenbach v. McClung*, 379 U.S. 294, 301-02, 85 S. Ct. 377, 13 L. Ed. 2d 290, (1964); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S. Ct. 523, 86 L. Ed. 726 (1942); *Shreveport Rate Cases*, 234 U.S. 342, 353, 34 S. Ct. 833, 58 L. Ed. 1341 (1914); *United States v. E.C. Knight Co.*, 156 U.S. 1, 39-40, 15 S. Ct. 249, 39 L. Ed. 325 (1895) (Harlan, J., dissenting); *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78, 9 L. Ed. 1004 (1838)). Moreover, he explained, "[W]e implicitly acknowledged in *Lopez* . . . [that] Congress's authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity

were regulated.'" *Id.* at 36, 125 S. Ct. 2195 (quoting *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624). "This statement referred to those cases permitting the regulation of intrastate activities 'which in a substantial way interfere with or obstruct the exercise of the granted power.'" *Id.* (quoting *Wrightwood Dairy Co.*, 315 U.S. at 119, 62 S. Ct. 523) (citing *Darby*, 312 U.S. at 118-19, 61 S. Ct. 451; *Shreveport Rate Cases*, 234 U.S. at 353, 34 S. Ct. 833). "As the Court put it in *Wrightwood Dairy*, where Congress has the authority to enact a regulation of interstate commerce, 'it possesses every power needed to make that regulation effective.'" *Id.* (quoting *Wrightwood Dairy*, 315 U.S. at 118-19, 62 S. Ct. 523). "Although this power 'to make . . . regulation effective' commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce, and may in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce. Moreover, as the passage from *Lopez* quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce." *Id.* at 37, 125 S. Ct. 2195 (alteration in original) (footnote omitted) (citing *Lopez*, 514 U.S. at 561, 115 S. Ct. 1624). "The relevant question is simply whether the means chosen are '*reasonably adapted*' to the attainment of a legitimate end under the commerce power." *Id.* (emphasis added) (quoting *Darby*, 312 U.S. at 121, 61 S. Ct. 451).

In *United States v. Comstock*, — U.S. —, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010), the majority of the Su-

preme Court confirmed Justice Scalia's view that the Necessary and Proper Clause empowers Congress to enact legislation that is "reasonably adapted" to effectuating an enumerated power. Specifically, in *Comstock*, the Supreme Court upheld a federal civil-commitment statute that "authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released. 18 U.S.C. § 4248." 130 S. Ct. at 1954. The Court concluded that Congress had such power based upon the Necessary and Proper Clause's authorization to implement the Commerce Clause and other enumerated powers. *Id.* It explained that to determine whether a statute was a constitutional exercise of the Necessary and Proper Clause power, "we look to see whether the statute constitutes a means that is *rationally related* to the implementation of a constitutionally enumerated power." *Id.* at 1956 (emphasis added); *see also id.* at 1962 (stating that the statute is constitutional under the Clause if it "represent[s] a rational means for implementing a constitutional grant of legislative authority"). The civil-commitment statute was constitutional, therefore, as it was "'*reasonably adapted*' to Congress' power to act as a responsible federal custodian[,] a power that rests, in turn, upon federal criminal statutes that legitimately seek to implement constitutionally enumerated authority," including the Commerce Clause power. *Id.* at 1961 (emphasis added) (citation omitted) (quoting *Darby*, 312 U.S. at 121, 61 S. Ct. 451); *see id.* at 1964 (stating that criminal statutes "often, but not exclusively" rely on the "Commerce Clause power").

The *Comstock* majority described five factors it considered in holding that the civil-commitment statute was constitutional: "(1) the breadth of the Necessary and

Proper Clause, (2) the long history of federal involvement in [legislating in relation to 'prison-related mental health statutes,' like the one at issue in *Comstock*, *id.* at 1958], (3) the sound reasons for the statute's enactment . . . , (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Id.* at 1965. However, the majority opinion demonstrates that these factors are merely ways of rephrasing or implementing the notion that Congress may pass laws rationally related or reasonably adapted to the effectuation of enumerated powers. For example, in discussing the first factor, the Court wrote: "We have . . . made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.* at 1956. Regarding the second factor, the Court explained that the history of federal involvement in an area could not on its own "demonstrate a statute's constitutionality"; instead, the Court stated that it was a means of analyzing "the reasonableness of the relation between the new statute and pre-existing federal interests." *Id.* at 1958. Similarly, in expounding the third factor, the Court stated that a court should find the reasons for a statute sound if they "satisf[y] the Constitution's insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority." *Id.* at 1962.

Other jurists and commentators have also read the *Comstock* majority as holding that a statute that is "rationally related" or "reasonably adapted" to an enumerated power is a constitutional expression of the Necessary and Proper Clause power. *See id.* at 1966 (Kenne-

dy, J., concurring in the judgment) ("The Court concludes that, when determining whether Congress has the authority to enact a specific law under the Necessary and Proper Clause, we look 'to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.'" (quoting *id.* at 1956 (majority opinion))); *United States v. Yelloweagle*, 643 F.3d 1275, 2011 WL 1632095, at *9 (10th Cir. May 2, 2011) (stating that a statute was constitutional under the Necessary and Proper Clause because it "represent[ed] a rational means for implementing a constitutional grant of legislative authority" (quoting *Comstock*, 130 S. Ct. at 1962) (internal quotation marks omitted)); *United States v. Pendleton*, 636 F.3d 78, 87 (3d Cir. 2011) (stating that in light of *Comstock*, to determine whether a statute is constitutional under the Necessary and Proper Clause, "the relevant inquiry is simply whether the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement" (quoting *Comstock*, 130 S. Ct. at 1957) (internal quotation marks omitted)); *United States v. Belfast*, 611 F.3d 783, 804 (11th Cir. 2010) (stating that *Comstock* holds that to determine whether "the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is *rationally related* to the implementation of a constitutionally enumerated power" (quoting *Comstock*, 130 S. Ct. at 1956) (internal quotation marks omitted)); *Al-Bihani v. Obama*, 619 F.3d 1, 25 n.11 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) (suggesting the same reading of *Comstock*); *Mead v. Holder*,

766 F. Supp. 2d 16, 33 (D.D.C. 2011) ("Courts look to see whether the challenged statute constitutes a means that is 'rationally related to the implementation of a constitutionally enumerated power' when determining whether it falls within Congress's power under the Necessary and Proper Clause." (quoting *Comstock*, 130 S. Ct. at 1956)); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 611 (E.D. Va. 2010) ("[T]he relevant inquiry is simply whether the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement." (alteration in original) (quoting *Comstock*, 130 S. Ct. at 1957) (internal quotation marks omitted));[8] 16A Am. Jur. 2d *Constitutional Law* § 343 (2011) ("In determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, the court looks to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power." (citing *Comstock*, — U.S. —, 130 S. Ct. 1949, 176 L. Ed. 2d 878)); Robert R. Harrison, *Health Care Reform in the Federal Courts*, 57 Fed. Law., Sept. 2010, at 52, 56 ("In *Comstock*, the Court noted that the scope of the Necessary and Proper Clause is limited by the inquiry 'whether the means chosen are reasonably adapted to the attainment of a legitimate end under the

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[8] *See also Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 393 (D. Mass. 2010) (stating that the second *Comstock* factor, history, is only a proxy to determine "the reasonableness of the relation between the new statute and pre-existing federal interests" (quoting *Comstock*, 130 S. Ct. at 1952) (internal quotation marks omitted)); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 250 (D. Mass. 2010) (same).

commerce power or other powers that the Constitution grants Congress the authority to implement.' " (quoting *Comstock*, 130 S. Ct. at 1956-57)).[9]

IV.

Accordingly, I conclude that § 2250(a)(2)(A)'s application to intra-state violations of SORNA by sex offenders convicted under federal law is necessary and proper to—that is, rationally related and reasonably adapted to—SORNA's statutory scheme, which is designed to regulate the interstate movement of sex offenders, using Congress's Commerce Clause power. *See Carr*, 130 S. Ct. at 2240 (citing 42 U.S.C. § 16901). In particular, I conclude that § 2250(a)(2)(A) is a constitutional exercise of Congress's Necessary and Proper Clause power because it is rationally related and reasonably adapted to § 2250(a)'s other subsection, § 2250(a)(2)(B), which we have already upheld as a proper exercise of the Commerce Clause power. *Whaley*, 577 F.3d at 258. For these reasons, I agree that the judgment of the district court must be affirmed.

Although I agree with the majority in affirming the judgment of the district court, I cannot join the majority

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[9] *See also* 16 Am. Jur. 2d *Constitutional Law* § 107 (2011) (stating that the second *Comstock* factor, history, is a proxy for determining "the reasonableness of the relation between the new statute and pre-existing federal interests"); Michael C. Dorf, *The Supreme Court's Decision About Sexually Dangerous Federal Prisoners: Could It Hold the Key to the Constitutionality of the Individual Mandate to Buy Health Insurance?*, Findlaw.com (May 19, 2010), http://writ.news.findlaw.com/dorf/20100519.html ("[T]he seven Justices in the [*Comstock*] majority [ ] were fully comfortable with federal power extending to areas that are not independently regulable, so long as regulation in those areas is reasonably related to regulation that is within the scope of congressional power.").

opinion because it departs from the doctrinal framework established by the Supreme Court for analyzing Commerce Clause legislation, such as SORNA and its provisions that are at issue in the present case. Contrary to the clear teachings of the Supreme Court in *Carr* and this court in *Whaley*, the majority interprets § 2250(a)(2)(A) as a stand-alone statute that is rationally related only to a pre-existing military penal statute, rather than as a necessary and integral part of the Commerce-Clause-based SORNA. Majority Op. 144 [p. 88a, *supra*] (stating that § 2250(a)(2)(A) does not reflect "any federal concern about [federal sex offenders'] impact on or relationship to the nationwide registration scheme" that SORNA was designed to create). By trying to justify SORNA's § 2250(a)(2)(A) as rationally related to the military law under which Kebodeaux was convicted and imprisoned, rather than reasonably adapted to SORNA's regulation of interstate commerce, which § 2250(a)(2)(A) was enacted with and made an integral part of, the majority relies upon an altogether different legislative power that is, at best, only tangentially related to SORNA's registration requirement. Consequently, I believe that the majority has fallen into serious error in reading *Comstock* to arrogate vast revisionary powers to judges, allowing them to uphold as necessary and proper any piece of legislation, regardless of the vehicle by which Congress enacted it, so long as the judges can in retrospect see a rational relationship between that law and some enumerated power.

Contrary to the majority's assertion, *United States v. George*, 625 F.3d 1124 (9th Cir. 2010), provides no support for its reasoning. *See* Majority Op. 140-41 [pp. 81a-82a, *supra*]. *George* addressed the constitutionality of § 2250(a)(2)(A) in response to the defendant's claim that

the provision fell "outside of Congress's commerce clause powers." 625 F.3d at 1129. The panel then stated that "Congress had the power under its broad commerce clause authority to enact the SORNA." *George*, 625 F.3d at 1130.[10] It explained that the Commerce Clause power includes the authority "to make all laws that are 'necessary and proper' for the accomplishment of [Congress's] commerce clause power," *id.* at 1129 (quoting U.S. Const. art. I, § 8, cl. 18), which in turn includes regulating "intrastate activity that has a substantial effect on interstate commerce," *id.* (citing *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S. Ct. 82, 87 L. Ed. 122 (1942)).

The *George* panel further quoted *Carr*, 130 S. Ct. at 2238, for the proposition that "it is entirely reasonable for Congress to have assigned to the federal government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Id.* at 1130. Immediately after this, the *George* panel also stated: "*Compare United States v. Comstock*, — U.S. —, 130 S. Ct. 1949, 176 L. Ed. 2d 878 (2010) (upholding under the Necessary and Proper Clause a statute that provided for the civil commitment of sexually dangerous federal prisoners beyond the date they would otherwise be released)." *Id.* Thus, rather than holding that § 2250(a)(2)(A) is constitutional because it is rationally related and reasonably adapted to a "federal interest in a *federal* convict"—as

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[10] In support of this proposition, the *George* panel cited *Whaley*, 577 F.3d at 258; *Gould*, 568 F.3d at 470-72; *Ambert*, 561 F.3d at 1210; *United States v. Hinckley*, 550 F.3d 926, 940 (10th Cir. 2008); and *May*, 535 F.3d at 921. *George*, 625 F.3d at 1130.

the majority reads the opinion, Majority Op. 145, [p. 92a, *supra*] (citing *George*, 625 F.3d at 1130)—*George* performed the analysis I suggest above, acknowledging that § 2250(a)(2)(A) is part of the broader SORNA statutory scheme, whose aim is to regulate sex offenders' interstate movement, and upholding § 2250(a)(2)(A) as a necessary and proper extension of that scheme. In doing so, it relied on the reasoning of *Comstock*, in which a majority of the Justices approved Justice Scalia's Commerce Clause analysis in *Raich*. *See also United States v. Ross*, 778 F. Supp. 2d 13, at 27, 2011 WL 1481394, at *13 (D.D.C. Apr. 19, 2011) (citing *George*, 625 F.3d at 1130, in support of the statement that "[t]he Court agrees with 'every circuit that has examined the issue in concluding that § 2250 is a legitimate exercise of congressional Commerce Clause authority.'" (alteration omitted) (quoting *United States v. Guzman*, 591 F.3d 83, 90 (2d Cir. 2010))); *United States v. Cotton*, 760 F. Supp. 2d 116, 139-40 (D.D.C. 2011) (same).

What is more, the Tenth Circuit has now upheld § 2250(a)(2)(A) as constitutional on the same ground that I urged in my previous concurring opinion. *United States v. Yelloweagle*, 643 F.3d 1275, 2011 WL 1632095 (10th Cir. May 2, 2011). In that case, Yelloweagle "was previously convicted of a federal sex offense," "failed to register as required [by SORNA], [and] was indicted by federal authorities under the [SORNA] enforcement provision," § 2250(a)(2)(A). *Id.* at 1276. On appeal, "Yelloweagle contended that [§ 2250(a)(2)(A)] lacked a jurisdictional basis and therefore was unconstitutional." *Id.* Citing and quoting that *Kebodeaux* concurring opinion, the Tenth Circuit concluded that § 2250(a)(2)(A) was constitutional because it was necessary and proper to facilitate SORNA's constitutional regulation of sex of-

fenders' interstate movement, which was authorized by Congress's power under the Commerce Clause. *Id.* at 1287-88 (also quoting *United States v. Kebodeaux*, 634 F.3d 293, 301 (5th Cir. 2011) (Dennis, J. concurring in the judgment), for the proposition "that § 2250(a)(2)(A) is 'a necessary and integral part of the commerce-clause-based SORNA'").

The Tenth Circuit in *Yelloweagle* reached this conclusion by first surveying "The Sex Offender Registration and Enforcement Regime." *Id.* at 1277. As a result, it recognized that SORNA was enacted as a comprehensive statutory scheme "to keep track of sex offenders" who move interstate. *Id.* at 1277 (quoting *George*, 625 F.3d at 1129) (internal quotation marks omitted).[11] Accordingly, the *Yelloweagle* court concluded that while the defendant focused his challenge narrowly on one of SORNA's provisions, § 2250(a)(2)(A), it was not proper for the panel to analyze the provision as if it were a stand-alone statute. *Id.* at 1287-88. Instead, the court held that § 2250(a)(2)(A) was constitutional as part of SORNA's statutory scheme. *Id.* Therefore, the court explained that it was key that Yelloweagle had "waived his challenge to § 16913," allowing the panel to presume that § 16913 was a valid exercise of the Commerce Clause power. *Id.* at 1284-85, 1286-87.[12]

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[11] Further supporting my view that *George* upheld § 2250(a)(2)(A) as necessary and proper to effectuate the exercise of Congress's Commerce Clause power, the Tenth Circuit not only relied on *George* for its holding, but also never suggested that *George* could be read as supporting any other analysis, nor that the Tenth Circuit's reasoning had split it from the Ninth Circuit.

[12] *Yelloweagle*'s assumption that § 16913 is constitutional under the Commerce Clause is consistent with the affirmative holding of this court in *Whaley* that § 16913 is a constitutional exercise of the neces-

The Tenth Circuit panel then concluded that "the Necessary and Proper Clause Gives Congress the Authority to Enact § 2250(a)(2)(A)." *Id.* at 1286. "As the Supreme Court recently stated: '[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.'" *Id.* at 1285 (alteration in original) (quoting *Comstock*, 130 S. Ct. at 1956). "[W]e have before the court an undisputedly valid exercise of Congress's Commerce Clause power—*viz.*, the sex offender registration scheme of § 16913." *Id.* at 1287. Therefore, "[i]t seems beyond peradventure that the criminal enforcement provision of § 2250(a)(2)(A) is 'rationally related or reasonably adapted to the effectuation' of the sex offender registration regime of § 16913." *Id.* (quoting *Kebodeaux*, 634 F.3d at 297 (majority opinion) (in turn citing *Comstock*, 130 S. Ct. at 1956)). "Section 2250(a)(2)(A) 'clearly was not enacted as a stand-alone provision, but rather as a complement to [SORNA's] other provisions.'" *Id.* (alteration in original) (quoting *Kebodeaux*, 634 F.3d at 301 (Dennis, J., concurring in the judgment)). "[I]n a concurring opinion in *Kebodeaux*, Judge Dennis highlighted the relationship between § 2250(a)(2)(A) and the registration regime of § 16913 . . . . 'Section 2250(a)(2)(A) helps to make SORNA's regulation of interstate commerce effective by obviating potential sources of interference or disruption of that objective. For example, had Congress not criminalized federal sex offenders'

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sary and proper power to effectuate the Commerce Clause power, and that § 2250(a)(2)(B) is a constitutional exercise of the Commerce Clause power. *Whaley*, 577 F.3d at 258-61.

undocumented, intra-state residence changes, there would [be] no deterrence to their moving intra-state without reregistering. This would have caused disparate and delayed enforcement of SORNA against federal sex offenders, allowing them to establish residences in some states as apparent law abiders, which would have made them difficult to monitor either in-state or in interstate commerce.'" *Id.* at 1288 (third alteration in original) (quoting *Kebodeaux*, 634 F.3d at 299 (Dennis, J., concurring in the judgment)). Therefore, the Tenth Circuit panel stated, "we conclude that Congress has the authority under the Necessary and Proper Clause to enact § 2250(a)(2)(A) in order to criminally enforce its validly enacted registration provision, § 16913." *Id.* at 1289.

* * *

Consistent with the Supreme Court and Circuit authority cited above, and unlike the majority, I would not treat § 2250(a)(2)(A) as a stand-alone statute. Instead, I believe we must analyze whether it is constitutional as part of SORNA's statutory scheme. Because (1) the Supreme Court and circuit courts have consistently explained that SORNA's statutory scheme is intended to regulate the interstate movement of sex offenders, and thus was passed pursuant to Congress's Commerce Clause power; (2) *Comstock* teaches that a majority of the Supreme Court has now approved and adopted Justice Scalia's Commerce Clause analysis in *Raich*; and (3) § 2250(a)(2)(A) clearly facilitates SORNA's regulation of sex offenders' interstate movement, because it is rationally related and reasonably adapted to preventing sex offenders from "slipping through the cracks" of state-based registration schemes, I would uphold

§ 2250(a)(2)(A) as a necessary and proper extension of Congress's Commerce Clause power to enact SORNA's other provisions, particularly § 2250(a)(2)(B). Doing so would be consistent with every other circuit that has considered the issue.

For these reasons, I concur only in the judgment upholding the constitutionality of § 2250(a)(2)(A) and affirming Kebodeaux's conviction and sentence.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

No. EP-08-CR-976-FM

UNITED STATES OF AMERICA, PLAINTIFF

v.

ANTHONY KEBODEAUX, DEFENDANT

[July 29, 2008]

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Before the Court is Defendant Anthony Kebodeaux's ("Kebodeaux") "Motion to Dismiss Indictment and Brief in Support" ("Motion") [Rec. No. 26], filed on May 27, 2008. Kebodeaux challenges the Indictment [Rec. No. 17] on constitutional and other grounds. The Government filed its "Response to Defendant's Motion to Dismiss Indictment" ("Response") [Rec. No. 30] on June 10, 2008. Kebodeaux filed his "Reply to Government's Response to Defendant's Motion to Dismiss the Indictment with Prejudice" ("Reply") [Rec. No. 31] on June 20, 2008. The Government's "Supplemental Response to Defendant's Motion to

Dismiss Indictment" ("Supplemental Response") [Rec. No. 37] followed on July 11, 2008. For the reasons discussed below, the Court will **DENY** Kebodeaux's Motion.

I. BACKGROUND

A. Factual Background

On April 2, 2008, the grand jury sitting in El Paso, Texas, returned a one-count Indictment [Rec. No. 17], charging Kebodeaux with violating 18 U.S.C. § 2250:

> Count One
>
> (18 U.S.C. § 2250—Failure to Register (Sex Offender))
>
> Beginning on or about August 14, 2007[,] and continuing until on or about March 12, 2008, in the Western District of Texas and elsewhere, defendant
>
> **ANTHONY KEBODEAUX**
>
> being a person who is a sex offender as defined for the purpose of the Sex Offender Registration and Notification Act by reason of a conviction under the United States Code of Military Justice, Article 120, Carnal Knowledge With A Child, and who is required to register under the Sex Offender Registration and Notification Act, did knowingly fail to register and update a registration as required by the Sex Offender Registration and Act [sic], in violation of Title 18, United States Code, section 2250(a)(2) and (3).[1]

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[1] Indictment, Rec. No. 17, at 1.

The Government expects to prove the following facts at trial. On May 17, 1999, Kebodeaux pleaded guilty to one count of carnal knowledge involving a minor, in violation of the United States Code of Military Justice, Article 120. At the time of the offense, Kebodeaux was a 21-year-old Airman in the United States Airforce. Among other things, Kebodeaux stipulated to engaging in a sexual relationship with a 15-year-old girl. He received a sentence of 3 months' confinement as well as a bad-conduct discharge. Although Kebodeaux initially appealed, he withdrew his appeal on June 14, 1999, and the sentence was imposed.

Sometime before August 8, 2007, Kebodeaux moved from San Antonio, Texas, to El Paso, Texas. On August 8, 2007, Kebodeaux presented himself to the El Paso Police Department ("EPPD") Sexual Offender Registration Team to complete a registration form for El Paso. While there, Kebodeaux signed a "CR-32 (Pre-Release Notification Form—Texas Sex Offender Registration Program)" ("CR-32"). By signing the CR-32 form, Kebodeaux acknowledged he was aware of his following responsibilities as a sex offender:

(a) lifetime registration;

(b) to notify EPPD within seven days of changing his address;

(c) to update his registration every ninety days;

(d) not later than the seventh day before moving to a new residence in Texas or in another state, to report in person to his primary registration authority to inform that authority of his intention to move;

(e) to provide all registrations, verifications, and notifications in person within the time periods indicated; and

(f) to register with an appropriate law enforcement agency in a new state within ten days of moving away from the State of Texas.

While before the EPPD Sex Offender Registration Team on August 8th, Kebodeaux also completed a "Sex Offender Update Form (Form CR-39)" ("CR-39"). On the CR-39 form, he listed his current residential address as 12215 Gateway West No. 309 ("the Gateway address") in El Paso, Texas, and reported he was self-employed.

On January 24, 2008, EPPD Officer Ruvalcaba unsuccessfully tried to locate Kebodeaux at the Gateway address. The apartment complex manager told Officer Ruvalcaba that Monica Guerra ("Guerra"), Kebodeaux's girlfriend, had at one point rented unit no. 309, but had moved out shortly before August 14, 2007. The manager additionally told Officer Ruvalcaba that Kebodeaux had never been a registered resident of the apartment complex.

The United States Marshals Service filed a Criminal Complaint [Rec. No. 1] against Kebodeaux on January 29, 2008, alleging a violation of 18 U.S.C. § 2250. In attempting to locate Kebodeaux, Deputy United States Marshals searched the Department of Justice's National Sex Offender Public Registry. The only result for the search was Kebodeaux's Texas registration with the EPPD on August 8, 2007, listing the Gateway residential address. Deputy Marshals ultimately located and arrested Kebodeaux on March 12, 2008, at Guerra's apartment in San Antonio, Texas.

Kebodeaux did not inform EPPD that he was leaving its jurisdiction, nor had he registered with San Antonio authorities upon his arrival.

B. Kebodeaux's Motion

Kebodeaux challenges the Indictment [Rec. No. 17] on the following grounds: (1) the Sex Offender Registration and Notification Act ("SORNA") violates the Commerce, the *Ex Post Facto,* Due Process, and Non-Delegation Clauses contained in the United States Constitution, as well as the Tenth Amendment to the same; (2) by retroactively applying SORNA, the Attorney General violated the Administrative Procedures Act, 5 U.S.C. § 553; and (3) the Indictment is fatally defective under the Fifth and Sixth Amendments because it does not tell Kebodeaux what he allegedly did to render him guilty of the charge against him. The Government urges the Court to reject Kebodeaux's arguments, asserting he either lacks standing to raise certain of his challenges or, alternatively, that his arguments lack merit.

III. SORNA'S STATUTORY SCHEME

Before reaching the merits of the parties' arguments, the Court will set forth the relevant portions of SORNA's statutory scheme.

SORNA is found in Title I of the Adam Walsh Child Protection and Safety Act of 2006, which the President signed into law on July 27, 2006.[2] Using the loss of federal funding as an inducement,[3] SORNA directs

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[2] Pub. L. 109-248, §§ 1-155 (2006).

[3] *See* 42 U.S.C. § 16925 (stating that jurisdictions failing to implement SORNA shall not receive ten per cent of the federal

the fifty states to enact laws creating and implementing SORNA's uniform nationwide sex offender registration program.[4]

SORNA also creates a new federal offense for failing to register as a sex offender.[5] That is, individuals who are required to register under SORNA and fail to do so commit a federal offense under 18 U.S.C. § 2250:

> § 2250. Failure to register:
>
> (a) In general. Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2)
>
> (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

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funds they would otherwise receive under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3750 *et seq.*).

[4] *See* 42 U.S.C. §§ 16912-16922 (setting forth the duties of the states and sex offenders under SORNA).

[5] *See* 18 U.S.C. § 2250 (setting forth the federal penalty for failing to register as a sex offender under SORNA).

> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.[6]

SORNA imposes the following registration requirements for sex offenders:

> § 16913. Registry requirements for sex offenders
>
> (a) In general. A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.
>
> (b) Initial registration. The sex offender shall initially register—
>
> (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
>
> (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.
>
> (c) Keeping the registration current. A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the infor-

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[6] 18 U.S.C. § 2250.

> mation required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.[7]

SORNA delegates to the Attorney General the authority:

> to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act [enacted July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).[8]

On February 28, 2007, the Attorney General issued an interim rule stating that "[t]he requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of the Act."[9]

IV. ANALYSIS

The Court has previously analyzed the bulk of Kebodeaux's arguments at length in the Memorandum Opinion and Order [Rec. No. 30] it entered in *United States v. Heth*, EP-08-CR-667-FM, on July 21, 2008, in which it denied the defendant's motion to dismiss the indictment. It will therefore not repeat that analysis here. The defendant in *Heth*, however, did not challenge the Indictment on *Ex Post Facto* Clause, Tenth

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[7] 42 U.S.C. § 16913(a)-(c).

[8] 42 U.S.C. § 16913(d).

[9] 28 C.F.R. § 72.3 (2007).

Amendment, or sufficiency-of-the pleadings grounds. The Court will therefore address these arguments.

A. *Whether SORNA violates the* Ex Post Facto *Clause*

Kebodeaux contends SORNA is criminal and punitive in nature and violates the *Ex Post Facto* Clause because it increases a defendant's punishment beyond what his initial conviction carried. Alternatively, Kebodeaux argues SORNA is so punitive in purpose or effect that it negates Congress's intention to label it a civil statute. Kebodeaux recognizes the Supreme Court recently upheld Alaska's sex offender statute against an *ex post facto* challenge in *Smith* v. *Doe*,[10] but asserts the Alaska statute and SORNA are distinguishable in several respects, with SORNA lacking the critical aspects which enabled the Alaska statute to pass constitutional muster.

The Government responds that Kebodeaux has no standing to raise an *ex post facto* challenge because the doctrine does not apply to this case; section 2250 neither serves to punish Kebodeaux for an act that was not a crime when allegedly performed nor increases the punishment for a crime committed before the law's enactment. The Government further notes Kebodeaux's alleged failure to update his registration occurred after SORNA's passage and the passage of the Attorney General's interim rule on February 28, 2007, and further does not deprive Kebodeaux of any defense that was available before SORNA's enactment. Even if Kebodeaux has standing to raise an *ex post facto* challenge, the Government asserts the Supreme

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[10] 538 U.S. 84 (2003).

Court's holding in *Smith* compels the conclusion that SORNA does not violate the *Ex Post Facto* Clause. To the extent Kebodeaux attempts to distinguish SORNA from the Alaska statute at issue in *Smith*, the Government insists those differences are not constitutionally significant.

1. Analytical Framework for *Ex Post Facto* Challenges

The framework for evaluating *ex post facto* challenges is well-established.[11] The Court's first task is to determine whether Congress meant the statute at issue to establish civil proceedings.[12] If Congress's intention "was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive," the Court must "further examine whether the statutory scheme 'is so punitive either in purpose or effect as to negate [Congress's] intention' to deem it 'civil.'"[13] The Court should ordinarily defer to Congress's stated intent, and therefore, "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'"[14]

Whether a statutory scheme is civil or criminal in nature is a question of statutory construction; the Court must consider the statute's text and structure to determine Congress's intent.[15] "A conclusion that

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[11] *Smith*, 538 U.S. at 92.

[12] *Id.*

[13] *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

[14] *Id.*

[15] *Id.*

[Congress] intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as [Congress] has stated it."[16] The Court must first inquire whether Congress, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or another."[17] "Where a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment."[18] Other formal aspects of a statute's enactment, such as the manner of its codification or the enforcement procedures it establishes, are also probative of Congress's intent.[19] By themselves, "the location and labels of a statutory provision do not . . . transform a civil remedy into a criminal one."[20]

Where the Court's inquiry leads to the conclusion that Congress intended to establish a civil, nonpunitive regime with the statute in question, the Court must then analyze the statute's effect by applying the seven factors identified in *Kennedy v. Mendoza-Martinez*, bearing in mind these factors merely represent a "useful framework" and are "neither exhaustive nor dispositive."[21] In the present case, the most relevant *Mendoza-Martinez* factors are whether, in its neces-

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[16] *Smith*, 538 U.S. at 92-93.

[17] *Id.* at 93 (internal quotation omitted).

[18] *Id.* at 93-94.

[19] *Id.* at 94.

[20] *Id.*

[21] *Smith*, 538 U.S. at 97 (internal quotations omitted) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)).

sary operation, the regulatory scheme: (a) "has been regarded in our history and traditions as a punishment"; (b) "imposes an affirmative disability or restraint"; (c) "promotes the traditional aims of punishment"; (d) "has a rational connection to a nonpunitive purpose"; or (e) "is excessive with respect to this purpose."[22]

2. Discussion

Kebodeaux argues Congress intended SORNA to be punitive in nature. To support his argument, Kebodeaux attempts to distinguish the Alaska statute's declaration of purpose, which the *Smith* Court determined was indicative of the Legislature's intent to create a civil, regulatory regime, from SORNA's stated purpose. Although the Alaska statute and SORNA both declare public safety as one of their goals, Kebodeaux argues it is significant that SORNA, unlike the Alaska statute, does not also specifically refer to sex offenders' high risk of recidivism or state that public notification will promote public safety. The Court finds Kebodeaux's argument unavailing.

The *Smith* Court analyzed the Alaska sex offender statute in depth, concluding it was the Alaska Legislature's intent to create a civil, nonpunitive regime.[23] Like SORNA, the Alaska statute contained a provision

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[22] *See id.* (identifying the key *Mendoza-Martinez* factors in a case challenging Alaska's sex offender registration and notification statute).

[23] *See id.* at 93-96 (analyzing the Alaska Legislature's intent in enacting its sex offender statute).

imposing criminal liability for failing to comply with the statute's requirements.[24]

The *Smith* Court noted the Alaska Legislature clearly stated its intent in the statutory text itself. That is, the Legislature found "sex offenders pose a high risk of reoffending" and identified the State's interest in enacting the law as "protecting the public from sex offenders."[25] The Legislature also determined "the release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety."[26] While it is true the Legislature mentions recidivism as a risk to public safety and notification as a means of increasing the public's safety, the Legislature's emphasis at all times is ultimately *public safety.* Similar to the Alaska statute, SORNA's declaration of purpose expressly states that Congress's goal is public safety: "In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those offenders . . ."[27] As the *Smith* Court stated, "[a]n imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate

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[24] *See id.* at 90 (noting §§ 11.56.835 and 11.56.840 of the Alaska statute provide for criminal prosecution of offenders who knowingly fail to comply).

[25] *Smith*, 538 U.S. at 93 (internal quotations omitted).

[26] *Id.* (internal quotations omitted).

[27] 42 U.S.C. § 16901.

nonpunitive governmental objective and has been historically so regarded.'"[28]

As further evidence of Congress's alleged punitive intent, Kebodeaux argues that SORNA differs significantly from the Alaska statute by broadening the class of offenders subject to registration; lengthening the duration of registration; creating classes of offenders; reducing the time frame for sex offenders to advise officials of any change to their registration information; and increasing the penalties for violating its registration requirements. The Court finds these are merely differences of degree rather than kind, and represent the kind of "imposition of restrictive measures on sex offenders adjudged to be dangerous" found nonpunitive in *Smith*.[29] Thus, like the Alaska statute at issue in *Smith*, nothing on the face of the statute suggests Congress sought to create "anything other than a civil scheme . . . designed to protect the public from harm."[30]

In sum, the Court finds SORNA represents a comprehensive national regulatory scheme for sex offenders, independent of the jurisdictional basis for the conviction (i.e., whether the offender's conviction issued under state, tribal, military, or other federal law). While failure to comply with SORNA's civil, regulatory provisions clearly gives rise to a criminal penalty, that fact does not vitiate SORNA's essential regulatory purpose.[31]

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[28] *Smith*, 538 U.S. at 93 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

[29] *Id.*

[30] *Smith*, 538 U.S. at 93 (internal quotation omitted).

[31] *See id.* at 90, 96 (finding the Alaska sex offender statute,

Kebodeaux asserts an alternative argument that, even if SORNA is deemed civil and nonpunitive, its punitive effects negate Congress's intention to create a civil regulatory regime. Kebodeaux, however, fails to brief his alternative argument. Moreover, the Court finds *Smith*'s detailed analysis and rejection of this argument precludes its success in this case.[32]

B. *Whether SORNA Violates the Tenth Amendment*

Kebodeaux argues SORNA encroaches upon state sovereignty, in violation of the Tenth Amendment, because its registration requirements impose a federal obligation on sex offenders to register in individual state-created and state-run sex offender registries. Further, state officials administering local registries must accept federally-required sex offender registrations before their states choose to adopt SORNA's provision's voluntarily. The Government counters that SORNA does not violate the Tenth Amendment because it only offers financial incentives to states to amend their existing registration laws. The Government asserts SORNA does not conscript the states to do anything more than what they already have done by creating their own sex offender registries.

1. The Tenth Amendment

The Tenth Amendment sets forth the powers reserved to states and the people: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the

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which included a provision imposing criminal liability for failure to comply with the statute's registration requirements, to establish a civil, nonpunitive regulatory scheme).

[32] *See id.* at 97-106.

States respectively, or to the people."[33] Under the Tenth Amendment, federal officials may not commandeer state officials to administer and enforce a federal regulatory program.[34] Congress may, however, condition state's receipt of federal grant money upon the fulfillment of federal statutory or administrative directives.[35]

2. Discussion

After due consideration, the Court concludes SORNA does not violate the Tenth Amendment. Although SORNA does require state officials to change their registration procedures to comply with the federal program, the requirement is in truth only a condition which must be met if the state wishes to avoid the loss of federal funding.[36] Because SORNA does not commandeer state officials, but rather seeks to influence state action by conditioning the receipt of federal monies upon SORNA's implementation, the Court finds it does not violate the Tenth Amendment.

C. *Whether the Indictment is Sufficiently Pled*

Kebodeaux contends the Indictment is fatally defective under the Fifth and Sixth Amendments because it does not tell Kebodeaux what he did to make him guilty of the charge against him. Specifically, Kebodeaux argues the Indictment is insufficient because it "largely parrots the language of the statute" and does

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[33] U.S. CONST. amend. X.

[34] *Printz v. United States*, 521 U.S. 898, 935 (1997).

[35] *New York v. United States*, 505 U.S. 144, 173 (1992).

[36] *Accord United States v. Gould*, 426 F. Supp. 2d 538, 549 (D. Md. 2007); *see also United States v. Pitts*, 2007 U.S. Dist. LEXIS 82632, *23-25 (M.D. La. 2007).

not state with particularity how he allegedly "'knowingly failed to register and update a registration.'"[37] Kebodeaux additionally asserts the date range alleged in the Indictment is overly broad and the word "update" is not defined by the statute and is ambiguous. The Government urges the Court to reject Kebodeaux's argument, asserting the Indictment meets the constitutional standard.

1. Applicable Law

An indictment is sufficient if it, "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense."[38] An indictment is generally sufficient where it "set[s] forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence [sic] intended to be punished.'"[39] With certain offenses in which the question of guilt turns "crucially upon such a specific identification of fact," however, the statutory language alone may not be sufficient:[40]

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[37] Def.'s Mot. to Dismiss Indictment, Rec. No. 26, at 25-26 (quoting the language of the Indictment).

[38] *Hamling v. United States*, 418 U.S. 87, 117 (1974)

[39] *Id.* (quoting *United States v. Carll*, 105 U.S. 611, 612 (1882)); *see also* FED. R. CRIM. P. 7(c)(1) (providing an indictment "musts be a plain, concise, and definite written statement of the essential facts constituting the offense charged.").

[40] *See United States v. Resendiz-Ponce*, 549 U.S. 102, ___, 127 S. Ct. 782, 789 (2007) (citing *Russell v. United States*, 369

> A clear example is the statute making it a crime for a witness summoned before a congressional committee to refuse to answer any question "pertinent to the question under inquiry" . . . [A] valid indictment for such refusal to testify must go beyond the words of [the statute] and allege the subject of the congressional hearing in order to determine whether the defendant's refusal was "pertinent."[41]

When charging an offense falling within the category set forth above, an indictment merely tracking the language of the statute is not enough.[42] Rather, the government must charge the crime with greater specificity to ensure fair notice to the defendant and that any ensuing conviction arises out of the theory of guilt presented to the grand jury.[43]

2. Discussion

The Court has set forth the relevant portions of the Indictment in Part I.A. of this Memorandum Opinion. After careful review, the Court finds Kebodeaux's attacks on its sufficiency unpersuasive. The Indictment alleges a violation of 18 U.S.C. § 2250. The Court finds guilt under § 2250 does not "depen[d] so crucially upon such [] specific identification of fact" to make it necessary for the Indictment to venture beyond the

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U.S. 749, 764 (1962)) ("[W]hile an indictment parroting the language of a federal criminal statute is often sufficient, there are crimes that must be charged with greater specificity.").

[41] *See id.* at ___, 127 S. Ct. at 789 (citing *Russell*, 369 U.S. at 764).

[42] *Id.* at ___, 127 S. Ct. at 789.

[43] *Id.* at ___, 127 S. Ct. at 789.

statutory language.[44] To the extent Kebodeaux asserts the time frame set forth in the Indictment is overly broad or that the word "update" is ambiguous, the Court rejects both these arguments.

V. CONCLUSION AND ORDER

For the reasons discussed above, the Court concludes it should, and hereby does, **DENY** Kebodeaux's Motion [Rec. No. 26].

SO ORDERED.

SIGNED this 29th day of **July, 2008.**

/s/ FRANK MONTALVO
FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

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[44] *Compare Russell*, 369 U.S. at 764 (finding the indictment insufficient), *with Resendiz-Ponce*, 549 U.S. at ___, 127 S. Ct. at 789 (holding an indictment for attempted illegal reentry was not defective because it failed to allege the specific overt act the defendant committed in seeking reentry) *and Hamling* 418 U.S. at 118-19 (finding the indictment alleging conspiracy and use of the mails to carry an obscene book and advertisement to be constitutionally sufficient; "[s]ince the various component parts of the constitutional definition of obscenity need not be alleged in the indictment in order to establish its sufficiency, the indictment in this case was sufficient to adequately inform petitioners of the charges against them.").

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EP-08-CR-667-FM
UNITED STATES OF AMERICA, PLAINTIFF

v.

GARY LEE HETH, DEFENDANT

[Filed: July 21, 2008]

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT

Before the Court is Defendant Gary Lee Heth's ("Heth") "Motion to Dismiss Indictment and Brief in Support" ("Motion") [Rec. No. 19]. Heth raises six challenges to the Indictment [Rec. No. 8] returned against him. After requesting and receiving an enlargement of time in which to do so, Plaintiff the United States of America (hereafter, "the Government") filed its "Response to Defendant's Motion to Dismiss Indictment" ("Response") [Rec. No. 22] on May 26, 2008. Heth's "Reply to Government's Response to Defendant's Motion to Dismiss" ("Reply") [Rec. No. 23] followed on June 5, 2008. For the reasons discussed

below, the Court concludes it should DENY Heth's Motion.

I. BACKGROUND

A. Factual Background

On March 5, 2008, the grand jury sitting in El Paso returned a two-count Indictment [Rec. No. 8] against Heth, charging him with failing to register as a sex offender as required under the Sex Offender Registration and Notification Act ("SORNA"). in violation of 18 U.S.C. § 2250 ("Count One"); and failing to register as a sex offender as required under the Wetterling Act, in violation of 42 U.S.C. § 14072 ("Count Two"). The Government expects the evidence at trial to show that, on July 28, 1997, Heth was convicted in El Paso County, Colorado, of one count of Sexual Assault of a Child by a Person in a Position of Trust. He received a sentence of five years' supervised probation. Heth's probation was revoked on October 22, 1998, and he was sentenced to a four-year term of imprisonment in the Colorado Department of Corrections ("DOC"). On May 9, 2001, before Heth's release from DOC, he completed a "Notice to Register as a Sex Offender," DOC Form 550-6A (7/00). By completing the form, Heth acknowledged, among other things, that:

(1) after his release from DOC, he had a duty to register within five business days of becoming a temporary or permanent resident of any Colorado city, town, or county;

(2) he must re-register every year on his birthday or the next business day if his birthday fell on a weekend:

(3) if he moved, he must submit a written address change to the agency out of whose jurisdiction he was moving and then register in the new jurisdiction within five days following the move; and

(4) if he moved outside Colorado, he was responsible for learning and obeying the registration laws in the state into which he moved.

On May 29, 2001, upon his release, Heth completed a second DOC form to reflect a change in his address.

On May 9, 2005, after being arrested for failing for register in Colorado, Heth signed another "Sex Offender Registration Notification and Receipt" form, acknowledging that:

(1) he was now required to register quarterly;

(2) he must continue to register for the rest of his life;

(3) if he moved, he must submit a written address change to the agency out of whose jurisdiction he was moving and then register in the new jurisdiction within five days following the move;

(4) if he moved out of Colorado, he was responsible for learning and obeying the registration requirements for the state into which he moved; and

(5) it was a felony offense to fail to comply with registration requirements.

Between September 2001 and his arrest in this case on February 8, 2008, Heth has been arrested six times on state failure-to-register charges, and convicted at least twice.

On February 8, 2008, El Paso Police Department officers arrested Heth on a probation violation warrant issued in the State of Colorado. On February 11, 2008, El Paso Police Department ("EPPD") Detective Nanez ("Nanez") interviewed Heth. Heth allegedly told Nanez that he had arrived in El Paso, Texas, on January 5, 2008, and stayed at the Rescue Mission until February 1, 2008. Heth also allegedly stated to Nanez that, thereafter, he lived on the streets in downtown El Paso until his arrest on February 8, 2008. EPPD's investigation revealed Heth was not registered as a sex offender with either EPPD or the El Paso County Sheriff's Department.

On February 13, 2008, EPPD transferred Heth to the custody of the United States Marshals Service ("USMS") pursuant to a federal warrant. While in federal custody and after being advised of his rights, Heth allegedly told authorities that he first traveled to El Paso, Texas, on December 25, 2005. He left El Paso, Texas, in February 2006 and traveled to different cities and states (including Atlanta and Augusta, Georgia). Heth then moved to Los Angeles, California, in June or July 2006 with his girlfriend, Lori Lane ("Lane") upon learning she was pregnant. Heth stayed in Los Angeles for approximately seventeen months. On December 23, 2007, Heth, Lane, and their child returned to El Paso, Texas, arriving on December 31, 2007. Heth and Lane ended their relationship on January 1, 2008. Heth remained in El Paso, living at

the Gateway Motel, the Opportunity Center, the Rescue Mission, and finally the streets of El Paso until arrested by EPPD.

When asked about being subject to a registration requirement, Heth allegedly told federal authorities he had been convicted of a sex crime in Colorado Springs, Colorado, twelve years prior and knew he had a lifetime registration requirement. Heth also allegedly stated the last time he registered was in Colorado Springs in 2005. He allegedly admitted he had not registered in any of the places he had lived thereafter.

B. Heth's Motion

Heth challenges the Indictment on the following grounds: (1) SORNA and the Wetterling Act[1] violate Section 8, Article I, of the United States Constitution (i.e., "the Commerce Clause"); (2) as applied to Heth, SORNA and the Wetterling Act violate the Separation-of-Powers doctrine embodied in Article I of the federal Constitution; (3) SORNA and the Wetterling Act violate the Fifth Amendment's Due Process Clause, unless they are construed as establishing specific-intent crimes; (4) because SORNA has not been implemented in Texas or Colorado, the Court should dismiss Count One of the Indictment; (5) because the Government may not prosecute Heth for simultaneous violations of SORNA and the Wetterling Act, the Government must elect to prosecute Heth for one count

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[1] The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program ("the Wetterling Act"), enacted in 1994, adopted national registration guidelines and made it a misdemeanor under federal law to fail to register under a state sex offender registration program. *See* 42 U.S.C. § 14072(i).

and dismiss the other; and (6) by retroactively applying SORNA, the Attorney General has violated the Administrative Procedures Act, 5 U.S.C. § 553.

In its Response, without conceding any of the arguments Heth makes regarding the Wetterling Act, the Government notes that it has since moved to dismiss Count Two of the Indictment "so as not to waste the Court's time determining the constitutionality of a misdemeanor statute which is shortly to be repealed."[2] As a result, the Court will consider Heth's constitutional challenges only as they implicate SORNA.

III. SORNA'S STATUTORY SCHEME

Before reaching the merits of the parties' arguments, the Court will set forth the relevant portions of SORNA's statutory scheme.

SORNA is found in Title I of the Adam Walsh Child Protection and Safety Act of 2006, which the President signed into law on July 27, 2006.[3] Using the loss of federal funding as an inducement,[4] SORNA directs the fifty states to enact laws creating and implementing SORNA's uniform nationwide sex offender registration program.[5]

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[2] Pl.'s Response to Def.'s Mot. to Dismiss Indictment, Rec. No. 22, at 38.

[3] Pub. L. 109-248, §§ 1-155 (2006).

[4] *See* 42 U.S.C. § 16925 (stating that jurisdictions failing to implement SORNA shall not receive ten per cent of the federal funds they would otherwise receive under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3750 *et seq.*).

[5] *See* 42 U.S.C. §§ 16912-16922 (setting forth the duties of the states and sex offenders under SORNA).

SORNA also creates a new federal offense for failing to register as a sex offender.[6] That is, individuals who are required to register under SORNA and fail to do so commit a federal offense under 18 U.S.C. § 2250:

> § 2250. Failure to register:
>
> (a) In general. Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2)
>
> (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice, the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.[7]

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[6] *See* 18 U.S.C. § 2250 (setting forth the federal penalty for failing to register as a sex offender under SORNA).

[7] 18 U.S.C. § 2250.

SORNA imposes the following registration requirements for sex offenders:

> § 16913. Registry requirements for sex offenders
>
> (a) In general. A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.
>
> (b) Initial registration. The sex offender shall initially register—
>
> (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
>
> (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.
>
> (c) Keeping the registration current. A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.[8]

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[8] 42 U.S.C. § 16913(a)-(c).

SORNA delegates to the Attorney General the authority:

> to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act [enacted July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).[9]

On February 28, 2007, the Attorney General issued an interim rule stating that "[t]he requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of the Act."[10]

IV. ANALYSIS

A. Whether SORNA Violates the Commerce Clause

Before proceeding to the merits, the Court first summarizes the parties' arguments. Heth asserts SORNA violates the Commerce Clause because it requires individuals convicted of purely local, intrastate offenses to register as sex offenders and prosecutes them under federal law if they fail to do so. Heth contends SORNA thus violates the Supreme Court's Commerce Clause jurisprudence set forth in *United States v. Lopez*,[11] *United States v. Morrison*,[12] and

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[9] 42 U.S.C. § 16913(d).

[10] 28 C.F.R. § 72.3 (2007).

[11] 514 U.S. 549 (1995).

[12] 529 U.S. 598 (2000).

United States v. Jones.[13] In those cases, the Supreme Court held the Commerce Clause does not empower Congress to federally prosecute individuals convicted of purely intrastate offenses where the intrastate conduct in question does not "substantially affect" interstate commerce. Heth additionally argues SORNA is not a constitutional exercise of Congress's power to regulate persons and things in interstate commerce, because it imposes registration requirements on individuals who are not in interstate commerce and have no connection to interstate commerce. The Government responds that *Lopez*, *Morrison*, and *Jones* do not implicate SORNA's constitutionality because Congress's power to impose the registration requirement stems from its authority to regulate persons or things in interstate commerce rather than its authority to regulate intrastate activities which have a substantial effect on interstate commerce. Alternatively, the Government argues that 18 U.S.C. § 2250 regulates activity which substantially affects interstate commerce.

1. Congress's Commerce Power

The United States Constitution grants Congress the authority to "regulate Commerce with foreign Nations, and among the several States" as well as the power to enact all "necessary and proper" laws to exercise that authority.[14] "In interpreting the commerce power, courts are bound both by the 'first principles' of a Constitution that establishes a federal government with 'enumerated powers,' and our judicial role, which requires deference to properly enacted

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[13] 529 U.S. 848 (2000).

[14] *See* U.S. CONST., art. I, § 8.

congressional regulations."[15] While the commerce power is "recognized as 'one of the most prolific sources of national powers,'" it is nonetheless constrained "within constitutionally determined 'outer limits.'"[16]

In *Lopez*, the Supreme Court established the framework for determining the outer limits of Congress's regulatory authority under the Commerce Clause.[17] It clarified that Congress may regulate and

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[15] *Groome Resources Ltd. LLC v. United States*, 234 F.3d 192, 202 (5th Cir. 2000).

[16] *Id.* at 202-03 (citing *Morrison*, 529 U.S. at 607-08).

[17] *See United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir. 2005) ("The Supreme Court's landmark decision in [*Lopez*] . . . synthesized more than a century of Commerce Clause activity into a definitive description of the commerce power."). *Lopez* invalidated the Gun Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm within a certain radius of a school. *See Lopez*, 514 U.S. at 522; *see also Groome*, 234 F.3d at 203 n.15 (summarizing *Lopez*). In the ensuing cases *Morrison* and *Jones*, the Supreme Court further defined Congress's authority to regulate activities having a substantial effect on interstate commerce. *See Groome*, 234 F.3d at 204 (discussing *Morrison*'s further refinement of *Lopez*'s analysis). *Morrison* invalidated the federal civil remedy provision of the Violence Against Women Act of 1994 on the grounds Congress lacked the constitutional authority under either the Commerce Clause or § 5 of the Fourteenth Amendment to enact the section's civil remedy. *See Morrison*, 529 U.S. at 619-20; *see also Groome*, 234 F.3d at 203 n.16 (summarizing *Morrison*). *Jones* invalidated a federal arson statute, 18 U.S.C. § 844(i), to the extent the statute attempted to make every act of arson a federal offense. *See Jones*, 529 U.S. at 859 ("We conclude that § 844(i) is not soundly read to make virtually every arson in the country a federal offense."). The *Jones* Court held that to be constitutional under the Commerce Clause, the provision could only cover arson committed against property currently used in commerce or in an activity affecting commerce. *See id.* It

protect three broad categories of activity pursuant to its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) those activities which substantially affect interstate commerce.[18]

The first *Lopez* prong, or the channels of commerce, are "the intrastate transportation routes through which persons and goods move."[19] These channels include highways, railroads, navigable waters, airspace, telecommunications networks, and national securities markets.[20]

The second *Lopez* prong, or the "[i]nstrumentalities of interstate commerce, by contrast, are the people and things themselves moving in commerce, including automobiles, airplanes, boats, and shipments of goods" and include pagers, telephones and mobile phones.[21] "Plainly, congressional power to regulate the channels and instrumentalities of commerce includes the power to prohibit their use for harmful purposes, even if the

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could not constitutionally apply to the arson of a dwelling place used only for everyday family living. *Id.*

[18] *Lopez*, 514 U.S. 549, 558-59.

[19] *Morrison*, 529 U.S. at 614 n.5.

[20] *Ballinger*, 395 F.3d 1225-26; *see also Groome*, 234 F.3d at 203 ("This category extends beyond the regulation of highways, railroads, air routes, navigable rivers, fiber-optic cables and the like. This category was one of the categories used to prohibit racial discrimination in public accommodations and has been used to prevent illicit goods from traveling through the channels of commerce.") (internal quotations and citation omitted).

[21] *Ballinger*, 395 F.3d at 1226.

targeted harm itself occurs outside the flow of commerce and is purely local in nature."[22] "The commerce power has always been construed by the Supreme Court to include the power to prohibit the use of the channels or instrumentalities of interstate commerce 'to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state or origin.'"[23]

> An act that promotes harm, not the harm itself, is all that must occur in commerce to permit congressional regulation. In fact, it is a "well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature."[24]

Nonetheless, "congressional regulation or protection of persons or things that move in interstate commerce must ensure that, in fact, a particular threat—whether posed by an interstate or intrastate activity—actually threatens persons or things with a plain and clear nexus to interstate commerce."[25]

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[22] *Id.*

[23] *Id.* at 1227 (quoting *Brooks v. United States*, 267 U.S. 432, 436 (1925)).

[24] *Id.* at 1227-28 (quoting *United States v. Orito*, 413 U.S. 139, 144 (1973)).

[25] *Groome*, 234 F.3d at 203.

The third *Lopez* prong "is the broadest expression of Congress' [sic] commerce power."[26] Congress's power to regulate activities which "'affect' commerce enables it to reach wholly intrastate conduct—that is, conduct that utilizes neither the channels nor the instrumentalities of interstate commerce—but only when it has 'a substantial relation to' (meaning it 'substantially affect[s]') interstate commerce."[27]

In *Morrison*, the Supreme Court refined the analysis regarding the third category of activity (i.e., "substantially affecting interstate commerce") by setting forth four additional factors for determining whether the congressional act at issue exceeds the scope of its constitutional authority.[28] The first factor is the economic nature of the regulated activity.[29] In *Lopez* and *Morrison*, the Court found that neither the "actors" nor the "conduct" of the regulation possessed a commercial character, and neither challenged statute's purpose or design reflected an evident commercial nexus.[30] The second consideration is the presence or absence of an express jurisdictional element in the

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[26] *Ballinger*, 395 F.3d at 1226.

[27] *Id.* (quoting *Lopez*, 514 U.S. at 558-59).

[28] *Groome*, 234 F.3d at 204.

[29] *Morrison*, 529 U.S. at 610 ("'Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained . . . [Although] petitioners and the dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis . . . a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case.").

[30] *Groome*, 234 F.3d at 204.

challenged statute.[31] For example, "[t]he lack of an express jurisdictional element in the *Lopez* statute weakened the claim that Congress was acting within its Commerce Clause powers."[32] In contrast, when a statute contains an express jurisdictional predicate, *Lopez*'s "substantially affects" test does not apply.[33] Rather, the activity sought to be regulated through the statute must only have a minimal effect on interstate commerce.[34]

The third factor is whether Congress made formal findings reflecting its legislative judgment that the activity in question substantially affects interstate commerce.[35] Although Congress is not required to make such findings for a challenged statute to be a constitutionally valid exercise of its commerce power under *Lopez*'s third prong, "the existence of such findings may 'enable'" a court "'to evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect [is] visible to the naked eye.'"[36] Lastly, "the

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[31] *Id.*

[32] *Id.*

[33] *See United States v. Williams*, 342 F.3d 350, 354-55 (4th Cir. 2003) (holding that, due to the presence of a jurisdictional predicate in the Hobbs Act, only a showing of a minimal effect on interstate commerce was required for the Act to be a proper exercise of Congress's commerce power); *United States v. Jamison*, 299 F.3d 114, 118 (2d Cir. 2002) (reaching the same conclusion); *United States v. Marrero*, 299 F.3d 653, 654-56 (7th Cir. 2002) (reaching the same conclusion).

[34] *See Williams*, 342 F.3d at 354-55; *Jamison*, 299 F.3d at 118; *Marrero*, 299 F.3d at 654-56.

[35] *Groome*, 234 F.3d at 204.

[36] *Morrison*, 529 U.S. at 612 (quoting *Lopez*, 514 U.S. at 563).

[*Morrison*] Court cautioned against accepting an 'attenuated' connection between the regulation and the interstate activity. Concerned that causal, 'but-for' arguments could lead to an evisceration of any limitations on federal power, the Court held Congress to a more direct link."[37]

With these principles in mind, the Court considers whether SORNA violates the Commerce Clause.

2. Discussion

After careful review, the Court finds SORNA is a constitutional exercise of Congress's commerce power under *Lopez*'s second prong, that is, the power to regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce.[38] Without citing any source of support, Heth asserts that, with SORNA, Congress attempts to use its commerce power to regulate individuals who are not in interstate commerce and have no connection to interstate commerce. Although SORNA contains a provision which applies to intrastate failure to register,[39] that is not the SORNA provision under which Heth is being prosecuted. Rather, Heth is indicted under 18 U.S.C. § 2250, which imposes criminal liability on sex offenders who travel away from their state of conviction and then fail to update authorities as to their new location. In that respect, § 2250 is akin to the Deadbeat Parents Act, which targets individuals who

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[37] *Groome*, 234 F.3d at 204-05 (internal citation omitted).

[38] *Lopez*, 514 U.S. at 558.

[39] *See* 42 U.S.C. § 16913 (imposing registration requirements for all sex offenders without the additional jurisdictional element of interstate travel).

intentionally avoid payment of child support obligations by traveling across state lines and has been held to be a constitutional exercise of Congress's commerce power.[40]

This Court therefore concludes SORNA does not violate the Commerce Clause.[41] It is axiomatic that a sex

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[40] *Cf. United States v. Kukafka*, 478 F.3d 531, 536 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 158 (2007) (concluding the Deadbeat Parents Act does not violate the Commerce Clause because "the 'persons' targeted by the Act are those who, like Kukafka, intentionally avoid payment [of child support obligations] by traveling across state lines. By targeting interstate child support obligations alone, Congress has ensured the Act regulates only those payments in interstate commerce and those persons who avoid their obligations by traveling across state lines.").

[41] Many other district courts have reached the same conclusion. *See, e.g., United States v. Ditomasso*, 2008 U.S. Dist. LEXIS 37870, *32-34 (D. R.I. May 8, 2008) ("[T]his Court finds that section 2250 is clearly constitutional under [*Lopez*'s] second prong . . . As the Supreme Court stated in *Lopez*, instrumentalities of commerce include 'persons or things in interstate commerce.' Here, SORNA, by regulating sex offenders who travel in interstate commerce, clearly regulates 'person . . . in interstate commerce.'") (internal citations omitted); *United States v. Howell*, 2008 U.S. Dist. LEXIS 7810, *25-27 (N.D. Iowa Feb. 1, 2008) ("Congress's authority to regulate interstate commerce and those persons engaged in interstate travel is sufficient to support the enactment of 18 U.S.C. § 2250 . . . [T]he court concludes that Congress acted within its power under the Commerce Clause in enacting SORNA . . ."); *United States v. Elliot*, 2007 U.S. Dist. LEXIS 91665, *9 (S.D. Fla. Dec. 10, 2007) ("SORNA's requirement that the Defendant travel through interstate commerce prior to being subject to the registration requirements of SORNA, [sic] is a valid exercise of Congress' [sic] power to regulate, [sic] 'the instrumentalities of interstate commerce, or persons or things in interstate commerce.'"); *United States v. Gonzalez*, 2007 U.S. Dist. LEXIS 58035, *24-25 (N.D. Fla. Aug. 9, 2007) ("I find that

offender's failure to comply with his registration obligations after traveling across state lines is an act which promotes harm and is within Congress' power to regulate under *Lopez*'s second prong.[42] Having concluded SORNA represents a proper exercise of Congress's commerce power under *Lopez*'s second prong, it is unnecessary for the Court to decider whether the statute would also be a proper exercise of Congress' commerce power under *Lopez*'s third prong.

B. Whether SORNA Violates the Nondelegation Doctrine

As discussed previously, SORNA delegates to the Attorney General the authority:

> to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act [enacted July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex of-

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§ 2250(a) is . . . a proper exercise of Congress's Commerce Clause power because 'Congress may regulate those individuals or things that travel in interstate commerce without regard to the reason for their movement' under the second prong of *Lopez*."); *United States v. Mason*, 510 F. Supp 2d 923, 932 (M.D. Fla. May 22, 2007) ("The statute is constitutional on its face because it falls within the second category set forth in *Lopez*."); *but see United States v. Powers*, 544 F. Supp. 2d 1331, 1333-36, (M.D. Fla. Apr. 18, 2008) (concluding SORNA is not a proper exercise of Congress's commerce power under the either the second or third *Lopez* categories).

[42] *See Ballinger*, 395 F.3d at 1227-28 ("An act that promotes harm, not the harm itself, is all that must occur in commerce to permit congressional regulation.").

fenders and for other categories of sex offenders who are unable to comply with subsection (b).[43]

On February 28, 2007, the Attorney General issued an interim rule stating that "[t]he requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of the Act."[44]

Heth acknowledges Congress may enlist the assistance of other branches of government, but asserts it may do so without violating the separation-of-powers doctrine set forth in Article I of the Constitution only if it gives clear guidance to the assisting branch. Here, Heth argues Congress delegated authority to the Attorney General to determine whether to apply SORNA retroactively to persons convicted before the statute's enactment date without sufficient guidance. Heth contends SORNA is therefore unconstitutional on this basis.

The Government responds that Heth lacks standing to raise this issue because the Attorney General's Interim Rule of which Heth complains does not apply to him. Alternatively, the Government asserts that, even if Heth has standing to challenge SORNA on nondelegation grounds, Congress properly set forth an intelligible guiding principle and thus Heth's argument is without merit.

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[43] 42 U.S.C. § 16913(d).

[44] 28 C.F.R. § 72.3 (2007).

1. The Nondelegation Doctrine

The nondelegation doctrine derives from Article I, section I of the Constitution, which states "all legislative Powers herein granted shall be vested in a Congress of the United States."[45] "From this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Govemment."[46] The nondelegation doctrine is founded on "'the principle of separation of powers that underlies our tripartite system of Government.'"[47]

> We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches. Thus Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[48]

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[45] U.S. CONST., Art. I, § 1; *see Touby v. United States*, 500 U.S. 160, 164-65 (1991) ("The Constitution provides that 'all legislative Powers herein granted shall be vested in a Congress of the United States.' From this language the Court has derived the nondelegation doctrine.").

[46] *Touby*, 500 U.S. at 165.

[47] *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 371 (1989)).

[48] *Id.* (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)) (internal citation omitted).

Applying this "intelligible principle test," the Supreme Court has "deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'"[49]

The foregoing standard is "driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[50] The practical nature of this standard is reflected in the fact that, despite numerous challenges, until 1935, the Supreme Court had never struck down a statute on nondelegation grounds.[51] Further, after invalidating two statutes in 1935 on nondelegation grounds the Supreme Court "[has] upheld, again without deviation, Congress' [sic] ability to delegate power under broad standards."[52]

2. Standing

Article III of the Constitution "restricts federal courts to the resolution of cases and controversies."[53] "That restriction requires that the party invoking federal jurisdiction have standing—the 'personal interest that must exist at the commencement of the litiga-

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[49] *Mistretta*, 488 U.S. at 372-73 (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

[50] *Id.* at 372.

[51] *Id.* at 373 (collecting cases).

[52] *Id.* (collecting cases).

[53] *Davis v. FEC*, ___U.S. ___, ___, 2008 U.S. LEXIS 5267, *16 (June 26, 2008).

tion.'"[54] "To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling."[55]

3. Discussion

After careful review, the Court concludes the Attorney General's Interim Order does not affect Heth and therefore he does not have standing to challenge the constitutionality of Congress's delegation of authority in SORNA § 16913. On the date of SORNA's enactment, Heth was a sex offender as defined by SORNA, Texas, and Colorado law. Heth was therefore able to register in both Colorado and Texas before SORNA's enactment and therefore does not fall into the extremely narrow category of offenders, described in § 16913(d), who are unable to register.

> The bulk of the statute does not make a distinction between those convicted before the Act and those convicted after. It imposes its requirements on "sex offenders," without qualification. The proper distinction for these purposes is between those who are currently registered, and those who are not. Those currently registered are unambiguously required by subsections (a) and (c) to keep their registrations current. Those not currently registered

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[54] *Id.* (quoting *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

[55] *Id.*

must register in accordance with the "initial registration" provisions in subsection (b).[56]

Subsection (d) of which Heth complains is exceedingly narrow in scope, applying only to those currently unregistered who are literally unable to comply with subsection (b) due to the age of their convictions.[57] Because Heth was already registered before SORNA's enactment, he clearly does not fall into the category addressed by the Attorney General's Interim Rule and therefore has no standing to challenge its constitutionality.[58]

In the alternative, even if Heth had standing to challenge the statute on nondelegation grounds, the Court would conclude that his argument lacks merit. Congress clearly set forth SORNA's purpose in 42 U.S.C. § 16901.[59]

> The fact that Congress has delegated the ability to specify the applicability of the registration requirements to sex offenders convicted before the statute's enactment, or its implementation in certain jurisdictions, or granted the Attorney General the power to promulgate regulations to ensure registration of individuals outside the purview of the

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[56] *United States v. Roberts*, 2007 U.S. Dist. LEXIS 54646, *3-4 (W.D. Va. 2007).

[57] *See id.*

[58] *Davis*, ___U.S. at ___, 2008 U.S. LEXIS 5267 at *16.

[59] *See* 42 U.S.C. § 16901 ("In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those offenders.").

> statutory language, does not allow the Attorney General to decide if the statute will have retroactive application. Rather, the statutory language is indicative of a gap-filling provision to insure the statutory purpose is effectuated when sex offenders fall outside the purview of Section 16913(b).[60]

Given the practical nature of the Supreme Court's "intelligible principle test,"[61] the Court concludes Congress did not overdelegate its legislative power in § 16913(d).

C. Whether SORNA Violates Heth's Fifth Amendment Right to Due Process

Heth argues that because he was not specifically informed of his duty to register under SORNA, prosecuting him for failing to do so violates his Fifth Amendment right to due process. The Government urges the Court to reject Heth's argument, citing abundant district court case law in support of its position.

After review, the Court concludes Heth's argument is without merit. It is undisputed, for purposes of Heth's Motion, that both before and after SORNA's enactment, the laws of Colorado and Texas would have required him to register as a sex offender. SORNA imposed no new obligations on him. Further, Heth has been prosecuted on several different occasions under Colorado law for failing to register and has also received repeated notice regarding his duties should he

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[60] *Roberts*, 2007 U.S. Dist. LEXIS 54646, at *7-8.

[61] *See Mistretta*, 488 U.S. at at 372-73 (emphasizing the practical nature of the intelligible principle test).

move to another jurisdiction. Thus, the Court finds Heth had actual and sufficient notice that failure to register was illegal.

Further, even if Heth did not receive actual notice of SORNA's requirements, it is a well founded principle of Anglo-American jurisprudence that ignorance of the law does not excuse noncompliance.[62]

> Few offenders have ever had relevant sections of the U.S. Code read to them before committing their crimes, yet they are expected to comply with it even so. Owners of firearms, doctors who prescribe narcotics, and purchasers of dyed diesel are all expected [to] keep themselves abreast of changes in the law which affect them, especially since such people are on notice that their activities are subject to regulation. Sex offenders are no different; they must comply with the law even when it changes suddenly and without notice, and they are well-advised to periodically check for changes because they are particularly subject to regulation.[63]

Having disposed of Heth's due process claim, the Court next considers whether the Court should dismiss Count One of the Indictment because SORNA has not been "implemented" in Texas or Colorado.

D. Whether a State's Failure to Implement SORNA Justifies Dismissal of the Indictment

Heth argues SORNA does not apply to him because neither Colorado nor Texas have yet implemented the

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[62] *See United States v. Roberts*, 2007 U.S. Dist. LEXIS 54646, *5 (W.D. Va. 2007).

[63] *Id.* at *5-6.

federal legislation. The Government counters that SORNA can de divided into a "state component" and an "individual component." The former component requires states to implement sex offender registries consistent with SORNA requirements by 2009 or lose part of their federal funding. The latter component, on the other hand, establishes a federal criminal offense for individuals who fail to register or update a registration and travel across state lines. The Government argues the enforcement of the individual component is in no way dependent upon the implementation of the state component. Rather, enforcement of federal criminal penalties for failure to register may be pursued independently where the states at issue have their own sex offender registries in place.

After due consideration, the Court agrees with the other district courts to have considered this issue and concluded that a defendant's obligation to register under SORNA does not hinge upon SORNA's implementation in the state at issue.[64] Rather, where, as

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[64] *See, e.g., United States v. David*, 2008 U.S. Dist. LEXIS 38613, *23 (W.D.N.C. May 12, 2008) (concluding North Carolina's failure to implement SORNA did not justify dismissal of the defendant's indictment); *United States v. Gould*, 526 F. Supp. 2d 538, 542 (D. Md. 2007) (concluding Maryland's failure to implement SORNA did not preclude the defendant's prosecution under § 2250(a)); *United States v. Adkins*, 2007 U.S. Dist. LEXIS 90737, *16 (N.D. In. 2007) ("The fact that the states have not yet met their obligations under SORNA . . . is of no consequence in determining whether it was possible for the Defendant to meet his own obligations under the Act."); *United States v. Pitts*, 2007 U.S. Dist. LEXIS 82632, *19 (M.D. La. 2007) (rejecting the defendant's implementation argument and stating "[c]ompliance does not require the offender to register in a jurisdiction that has enacted legislation complying

here, the states at issue have sex offender registries, it is irrelevant whether the states have in fact implemented SORNA. SORNA merely requires that the offender comply with his registration duties under state law.

E. Whether the Attorney General Has Violated the Administrative Procedures Act by Retroactively Applying SORNA

Heth argues the Attorney General violated the Administrative Procedures Act because it promulgated Regulation 28 C.F.R. § 72.3 without the requisite 30-day notice and comment period set forth in 5 U.S.C. § 553. The Government responds that the Regulation does not apply to Heth and therefore he may not challenge whether the Attorney General violated the APA when promulgating the Regulation. Alternatively, the Government asserts the Attorney General did not violate the APA. More specifically, the Government contends the APA permits agencies to enact rules without prior notice and comment period for good cause where allowing the comment period is impractical, unnecessary, or contrary to the public interest. The Government argues such good cause existed in relation to Regulation 28 C.F.R. § 72.3, as set forth in the Attorney General's statement accompanying the regulation:

> The implementation of this rule as an interim rule, with provisions for post-promulgation public com-

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with the requirements of [SORNA]."); *United States v. Beasley*, 2007 U.S. Dist. LEXIS 85793, *10-11 (N.D. Ga. 2007) ("Registration under SORNA means registration under a state's sex offender registration rules.").

ments, is based on the "good cause" exceptions found at 5 U.S.C. [§§] 553(b)(3)(B) and (d)(3), for circumstances in which "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." The rule specifies that the requirements of the Sex Offender Registration and Notification Act apply to all sex offenders (as defined in that Act), including those convicted of the offense for which registration is required prior to the enactment of the Act. The applicability of the Act's requirements promotes the effective tracking of sex offenders following their release, by means described in sections 112-17 and 119 of the Act, and the availability of information concerning their identities and locations to law enforcement and members of the public, by means described in sections 118 and 121 of the Act.

The immediate effectiveness of this rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements—and related means of enforcement, including criminal liability under 18 U.S.C. [§] 2250 for sex offenders who knowingly fail to register as required—to sex offenders whose predicate convictions predate the enactment of SORNA. Delay in the implementation of this rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions. The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could

> have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA. This would thwart the legislative objective of "protect[ing] the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders," because a substantial class of sex offenders could evade the Act's registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule.
>
> It would accordingly be contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. [§] 553(b) or with the delayed effective date normally required under 5 U.S.C. [§] 553(d).[65]

Before turning to the merits of Heth's argument, the Court considers the applicable law.

1. Rule Making Under the APA

Title 5 U.S.C. § 533 governs federal agency rule making procedures:

> § 533. Rule making
>
> (a) This section applies, according to the provisions thereof, except to the extent that there is involved—

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[65] 72 Fed. Reg. 8894, 8896-97 (2007).

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rulemaking proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

> (c) After notice required by this section, the agency shall give interested persons the opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title [5 U.S.C. §§ 556 and 557] apply instead of this subsection.
>
> (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—
>
> (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
>
> (2) interpretative rules and statements of policy; or
>
> (3) as otherwise provided by the agency for good cause found and published with the rule.
>
> (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.[66]

When adjudicating a challenge to agency action taken pursuant to the "good cause" exception to the ordinary notice-and-comment procedure, the reviewing court must sustain the action unless the agency acted in an

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[66] 5 U.S.C. § 553.

arbitrary or capricious matter or its action constituted an abuse of discretion.[67]

2. Analysis

For the reasons discussed in Part IV.B.3. of this Memorandum Opinion, the Court concludes Heth lacks standing to challenge whether the Attorney General acted in conformity with the APA in promulgating Regulation 28 C.F.R. § 72.3. In addition, the Court finds the Attorney General did not violate § 533 when it invoked the "good cause" exception to the ordinary rule making procedure. The Attorney General properly published its statement of good cause with the regulation.[68] Further, nothing in that statement evidences the arbitrariness, capriciousness, or abuse of discretion prohibited by the APA, but rather constitutes a reasonable assessment of the need for immediate rule making to effectuate SORNA's purposes.[69]

V. CONCLUSION AND ORDER

For the reasons discussed above, the Court concludes it should deny Heth's Motion. It accordingly enters the following order:

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[67] *See* 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law.").

[68] *See* 5 U.S.C. § 553(d)(3).

[69] *See* 5 U.S.C. § 706(2)(A); *see also Gould*, 526 F. Supp. 2d at 546 ("The Attorney General demonstrated good cause for failing to comply with the strictures of the APA[;] therefore, the Interim Order was valid."); *Pitts*, 2007 U.S. Dist. LEXIS 82632 at *22-23 (concluding that the Attorney General's Interim Rule met the APA's requirements).

A. Heth's Motion [Rec. No. 19] is hereby DENIED.

SO ORDERED.

SIGNED this 21 day of **July, 2008.**

/s/ FRANK MONTALVO
FRANK MONTALVO
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Cause No. EP-08-CR-976-FM
UNITED STATES OF AMERICA

v.

ANTHONY KEBODEAUX

[Filed: Aug. 26, 2008]

STIPULATION OF FACTS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the United States of America, by and through the United States Attorney for the Western District of Texas and the undersigned Assistant United States Attorney, and the defendant ANTHONY KEBODEAUX, by and through his attorney, and offers unto this Honorable Court the following stipulations:

If the Government were to call witnesses in the above-referenced cause, those witnesses would testify to the following facts:

1. On June 14, 1999, A Special Court-Martial Or-

der was entered against KEBODEAUX at Peterson Air Force Base, Colorado adjudging guilt for a violation of United States Code of Military Justice under Article 120—Carnal Knowledge involving a female under the age of 16 years. On or about September 18, 1999, he withdrew his appeal and the sentence was executed.

A. A true and correct copy of the Special Court-Martial Order (No. 5) adjudging KEBODEAUX's guilt, dated June 14, 1999, shall be entered into the record as *Government's Exhibit 1.*

B. A true and correct copy of the Special Court Martial Order (No. 11) indicating defendant's withdrawal of his right to appellate review, dated September 18, 1999, shall be entered into the record as *Government Exhibit 2.*

2. On August 8, 2007, upon moving from San Antonio, Texas to El Paso, Texas, which is within the Western District of Texas, defendant KEBODEAUX reported the El Paso Police Department Sexual Offender Registration Team to complete the necessary registration forms. At that time, KEBODEAUX signed a CR-32 (Pre-Release Notification Form Texas Sex Offender Registration Program), on which KEBODEAUX indicated the awareness of his responsibilities as a registered sex offender, including but not limited to:

(a) lifetime registration;

(b) a requirement to update registration every 90 days;

(c) Not later than the 7th day before a move to a

new residence in this state or another state, he must report in person to his primary registration authority and inform them of his intention to move;

(d) Not later than the 7th day after a change in residence within the state of Texas, he would update his registration to reflect the new address; and

(e) that all registrations, verifications, and notifications must be provided in person within the time periods indicated.

A. A true and correct copy of the Form CR-32—Pre-Release Notification Form, dated August 8, 2007, shall be entered into the record as *Government Exhibit 3*.

3. On August 8, 2007, KEBODEAUX also completed and signed a filed a Form CR-39 (Texas Department of Public Safety Sex Offender Update Form) and filed it with the El Paso Police Department as a sex offender. Thereon, KEBODEAUX listed an address of 12215 Gateway West #309 in El Paso, Texas.

A. A true and correct copy of the From CR-39—Sex Offender Update Form, dated August 8, 2007, shall be entered into the record as *Government Exhibit 4*.

4. On January 24, 2008, Officer Ruvalcaba of the El Paso Police Department attempted to locate KEBODEAUX at his registered address of 12215 Gateway West #309, El Paso, Texas. Officer Ruvalcaba was unable to locate KEBODEAUX and contacted the management at the apartments and was informed Apartment 309 was rented to a Monica

Guerra (KEBODEAUX's girlfriend) but she had move out on or about August 14, 2007. Officer Ruvacalba also learned defendant KEBODEAUX was not, nor had he ever been, a registered tenant of the apartments.

5. On March 12, 2008, defendant was arrested in San Antonio, Texas where he had been residing since mid-August 2007. KEBODEAUX neither informed EPPD he was leaving El Paso, Texas nor registered with the San Antonio, Texas authorities upon arriving there.

Respectfully submitted,

JOHNNY SUTTON
UNITED STATES ATTORNEY

BY: /s/ J. BRANDY GARDES

J. BRANDY GARDES
Assistant U.S. Attorney
Calif. Bar No. 144770
U.S. Attorney Office
700 E. San Antonio, Ste. 200
El Paso, Texas 79901
(915) 534-6884

SO STIPULATED this [19] day of Aug., 2008.

/s/ ANTHONY KEBODEAUX
ANTHONY KEBODEAUX
Defendant

/s/ WILLIAM MAYNARD, ESQ.
WILLIAM MAYNARD, ESQ.
Attorney for Defendant

APPENDIX G

[Seal Omitted] [Seal Omitted]

ASSISTANT SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

[Dec. 23, 1998]

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMPTROLLER OF THE DEPARTMENT OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR OF ADMINISTRATION AND MANAGEMENT
DIRECTORS OF DEFENSE AGENCIES
DEFENSE PARTNERSHIP COUNCIL

SUBJECT: Notice of Release of Military Offenders Convicted of Sex Offenses and Crimes Against Minors

This directive-type memorandum implements policy, assigns responsibilities, and prescribes procedures for the registration and notice of release of certain military offenders to state authorities to comply with the requirements of an amendment in The Departments of Commerce, Justice, State Appropriations Act of 1998, [Section 115(a)(8)(c) of Title I of Public Law 105-119, 111 Stat. 2440]. This law requires the Secretary of Defense to establish procedures to provide information to State and local officials upon the release of those convicted of sexually violent offenses and offenses against victims who were a minor (hereafter "covered offenses"). The attachment to this memorandum lists the covered military offenses.

The Secretaries of the Military Departments shall ensure compliance with this memorandum and take reasonable and necessary steps to fully implement the requirements of Federal law.

Before final release from confinement, DoD correctional facility commanders will advise prisoners convicted of a covered offense of the registration requirements of the State in which the prisoner will reside upon release from confinement. The notice provided to a prisoner shall contain information that the prisoner is subject to a registration requirement as a sex offender in any State in which the person resides, is employed, carries on a vocation, or is a student. Confinement facilities shall obtain the prisoner's acknowledgement in writing that the prisoner was informed of the registration requirements. The documentation shall be made part of the prisoner's perma-

nent file and maintained by the prisoner's branch of Service according to policies and regulations prescribed by the Secretary of the Military Department concerned.

Before release of prisoners convicted of a covered offense, facility commanders shall provide written notice of the release to the following:

Chief state law enforcement officer of the State in which the prisoner will reside upon release from confinement;

Chief local law enforcement officer of the jurisdiction in which the prisoner will reside upon release from confinement; and

State or local agency responsible for maintenance of sex offender registration information for the State in which the prisoner will reside upon release from confinement.

The notices shall include the prisoner's name, projected address, criminal history including prior court-martial convictions, a description of the offense of which the prisoner was convicted, any restrictions or conditions of release, final release date, and the information that the prisoner shall be subject to a registration requirement as a sex offender. DD Form 2791, Notice of Release of Convicted Sex Offender, may be used for making the required notifications. Notice shall be provided at least 5 days before release from confinement.

Notice about a subsequent change of residence by a prisoner convicted of a covered offense during any pe-

riod of supervised release or parole shall also be provided to the agencies and officers specified above. The law requires U.S. probation officers to provide notice of changes in parolee residence while the parolee is under U.S. probation officer supervision.

Notification to State and local officials is not required for prisoners transferred to another correctional facility. Upon the transfer of a military prisoner convicted of a covered offense to a facility under the control of the Federal Bureau of Prisons, the Military Service of the prisoner concerned shall provide written notification to the Bureau that the prisoner has been so convicted. The Bureau of Prisons shall provide notice of release and inform the prisoner concerning registration obligations under the law.

The Secretaries of the Military Departments shall also establish procedures necessary to comply with the notice requirements of the Federal law for those members convicted of a covered offense who are not in confinement when released from active duty.

This memorandum is effective immediately. A DoD Directive or Instruction incorporating the substance of this memorandum shall be issued within 90 days.

/s/ FRANCIS M. RUSH

FRANCIS M. RUSH, JR.
Acting Assistant Secretary

Attachment:
As stated

Offenses Requiring Processing as a Convicted Sex Offender

Convictions of any of the following offenses punishable under the Uniform Code of Military Justice shall trigger requirements to notify state and local law enforcement agencies and to provide information to inmates concerning sex offender registration requirements. A "minor" is a person under the age of sixteen (16).

UCMJ Article	DIBRS Code	Offense
120	120A	Rape
120	120B1/2	Carnal Knowledge
125	125A	Forcible Sodomy
125	125b1/2	Sodomy Involving a Minor
133	133D	Conduct Unbecoming an Officer (involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor).
134	134-B6	Pandering or Prostitution Involving a Minor
134	134-C1	Indecent Assault
134	134-C4	Assault with Intent to Commit Rape
134	134-C6	Assault with Intent to Commit Sodomy
134	134-R1	Indecent Act with a Minor
134	134-R3	Indecent Language to a Minor

134	134-S1	Kidnapping of a Minor (by a person not parent).
134	134-Z	Conduct Prejudicial to Good Order and Discipline or Service Discrediting that Constitutes Pornographic Acts Involving a Minor
134	134-Z	Conduct Prejudicial to Good Order and Discipline or Service Discrediting (involving any sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor)
134	134-Y2	Assimilative Crime Conviction (of a sexually violent offense or a criminal offense of a sexual nature against a minor or kidnapping of a minor)
80		Attempt (to commit any of the foregoing)
81		Conspiracy (to commit any of the foregoing)
82	082-A	Solicitation (to commit any of the foregoing)

APPENDIX H

1. 18 U.S.C. 2250 provides in relevant part:

Failure to register

(a) IN GENERAL.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) AFFIRMATIVE DEFENSE.—In a prosecution for a violation under subsection (a), it is an affirmative defense that—

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

* * * * *

2. 18 U.S.C. 4042 (2000, repealed in part in 2006) provides in pertinent part:

Duties of Bureau of Prisons

* * * * *

(c) NOTICE OF SEX OFFENDER RELEASE.—(1) In the case of a person described in paragraph (4) who is released from prison or sentenced to probation, notice shall be provided to—

(A) the chief law enforcement officer of the State and of the local jurisdiction in which the person will reside; and

(B) a State or local agency responsible for the receipt or maintenance of sex offender registration information in the State or local jurisdiction in which the person will reside.

The notice requirements under this subsection do not apply in relation to a person being protected under chapter 224.

(2) Notice provided under paragraph (1) shall include the information described in subsection (b)(2), the place where the person will reside, and the information that the person shall be subject to a registration requirement as a sex offender. For a person who is released from the custody of the Bureau of Prisons whose expected place of residence following release is known

to the Bureau of Prisons, notice shall be provided at least 5 days prior to release by the Director of the Bureau of Prisons. For a person who is sente . ed to probation, notice shall be provided promptly by the probation officer responsible for the supervision of the person, or in a manner specified by the Director of the Administrative Office of the United States Courts. Notice concerning a subsequent change of residence by a person described in paragraph (4) during any period of probation, supervised release, or parole shall also be provided to the agencies and officers specified in paragraph (1) by the probation officer responsible for the supervision of the person, or in a manner specified by the Director of the Administrative Office of the United States Courts.

(3) The Director of the Bureau of Prisons shall inform a person described in paragraph (4) who is released from prison that the person shall be subject to a registration requirement as a sex offender in any State in which the person resides, is employed, carries on a vocation, or is a student (as such terms are defined for purposes of section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994), and the same information shall be provided to a person described in paragraph (4) who is sentenced to probation by the probation officer responsible for supervision of the person or in a manner specified by the Director of the Administrative Office of the United States Courts.

(4) A person is described in this paragraph if the person was convicted of any of the following offenses (including such an offense prosecuted pursuant to section 1152 or 1153):

(A) An offense under section 1201 involving a minor victim.

(B) An offense under chapter 109A.

(C) An offense under chapter 110.

(D) An offense under chapter 117.

(E) Any other offense designated by the Attorney General as a sexual offense for purposes of this subsection.

(5) The United States and its agencies, officers, and employees shall be immune from liability based on good faith conduct in carrying out this subsection and subsection (b).

* * * * *

3. 42 U.S.C. 14071 (2006, repealed effective 2009) provides:

Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program

(a) In general

(1) State guidelines

The Attorney General shall establish guidelines for State programs that require—

(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in

subparagraph (A) of subsection (b)(6) of this section; and

(B) a person who is a sexually violent predator to register a current address for the time period specified in subparagraph (B) of subsection (b)(6) of this section.

(2) Determination of sexually violent predator status; waiver; alternative measures

(A) In general

A determination of whether a person is a sexually violent predator for purposes of this section shall be made by a court after considering the recommendation of a board composed of experts in the behavior and treatment of sex offenders, victims' rights advocates, and representatives of law enforcement agencies.

(B) Waiver

The Attorney General may waive the requirements of subparagraph (A) if the Attorney General determines that the State has established alternative procedures or legal standards for designating a person as a sexually violent predator.

(C) Alternative measures

The Attorney General may also approve alternative measures of comparable or greater effectiveness in protecting the public from unusually dangerous or recidivistic sexual offenders in lieu of the specific measures set forth in this section regarding sexually violent predators.

(3) Definitions

For purposes of this section:

(A) The term "criminal offense against a victim who is a minor" means any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the following range of offenses:

(i) kidnapping of a minor, except by a parent;

(ii) false imprisonment of a minor, except by a parent;

(iii) criminal sexual conduct toward a minor;

(iv) solicitation of a minor to engage in sexual conduct;

(v) use of a minor in a sexual performance;

(vi) solicitation of a minor to practice prostitution;

(vii) any conduct that by its nature is a sexual offense against a minor;

(viii) production or distribution of child pornography, as described in section 2251, 2252, or 2252A of title 18; or

(ix) an attempt to commit an offense described in any of clauses (i) through (vii), if the State—

(I) makes such an attempt a criminal offense; and

(II) chooses to include such an offense in those which are criminal offenses against a victim who is a minor for the purposes of this section.

For purposes of this subparagraph conduct which is criminal only because of the age of the victim shall not be considered a criminal offense if the perpetrator is 18 years of age or younger.

(B) The term "sexually violent offense" means any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the range of offenses encompassed by aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18 or as described in the State criminal code) or an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse (as described in such sections of title 18 or as described in the State criminal code).

(C) The term "sexually violent predator" means a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

(D) The term "mental abnormality" means a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.

(E) The term "predatory" means an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

(F) The term "employed, carries on a vocation" includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether financially compensated, volunteered, or for the purpose of government or educational benefit.

(G) The term "student" means a person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary school, trade, or professional institution, or institution of higher education.

(b) Registration requirement upon release, parole, supervised release, or probation

An approved State registration program established under this section shall contain the following elements:

(1) Duties of responsible officials

(A) If a person who is required to register under this section is released from prison, or placed on parole, supervised release, or probation, a State prison officer, the court, or another responsible officer or official, shall—

(i) inform the person of the duty to register and obtain the information required for such registration;

(ii) inform the person that if the person changes residence address, the person shall report the change of address as provided by State law;

(iii) inform the person that if the person changes residence to another State, the person shall report the change of address as provided by State law and comply with any registration requirement in the new State of residence, and inform the person that the person must also register in a State where the person is employed, carries on a vocation, or is a student;

(iv) obtain fingerprints and a photograph of the person if these have not already been obtained in connection with the offense that triggers registration; and

(v) require the person to read and sign a form stating that the duty of the person to register under this section has been explained.

(B) In addition to the requirements of subparagraph (A), for a person required to register under subparagraph (B) of subsection (a)(1) of this section, the State prison officer, the court, or another responsible officer or official, as the case may be, shall obtain the name of the person, identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the person.

(2) Transfer of information to State and FBI; participation in national sex offender registry

(A) State reporting

State procedures shall ensure that the registration information is promptly made available to a law enforcement agency having jurisdiction where the person expects to reside and entered into the appropriate State records or data system. State procedures shall also ensure that conviction data and fingerprints for persons required to register are promptly transmitted to the Federal Bureau of Investigation.

(B) National reporting

A State shall participate in the national database established under section 14072(b) of this title in accordance with guidelines issued by the Attorney General, including transmission of current address information and other information on registrants to the extent provided by the guidelines.

(3) Verification

(A) For a person required to register under subparagraph (A) of subsection (a)(1) of this section, State procedures shall provide for verification of address at least annually.

(B) The provisions of subparagraph (A) shall be applied to a person required to register under subparagraph (B) of subsection (a)(1) of this section, except that such person must verify the registration

every 90 days after the date of the initial release or commencement of parole.

(4) Notification of local law enforcement agencies of changes in address

A change of address by a person required to register under this section shall be reported by the person in the manner provided by State law. State procedures shall ensure that the updated address information is promptly made available to a law enforcement agency having jurisdiction where the person will reside and entered into the appropriate State records or data system.

(5) Registration for change of address to another State

A person who has been convicted of an offense which requires registration under this section and who moves to another State, shall report the change of address to the responsible agency in the State the person is leaving, and shall comply with any registration requirement in the new State of residence. The procedures of the State the person is leaving shall ensure that notice is provided promptly to an agency responsible for registration in the new State, if that State requires registration.

(6) Length of registration

A person required to register under subsection (a)(1) of this section shall continue to comply with this section, except during ensuing periods of incarceration, until—

(A) 10 years have elapsed since the person was released from prison or placed on parole, supervised release, or probation; or

(B) for the life of that person if that person—

(i) has 1 or more prior convictions for an offense described in subsection (a)(1)(A) of this section; or

(ii) has been convicted of an aggravated offense described in subsection (a)(1)(A) of this section; or

(iii) has been determined to be a sexually violent predator pursuant to subsection (a)(2) of this section.

(7) Registration of out-of-State offenders, Federal offenders, persons sentenced by courts martial, and offenders crossing State borders

As provided in guidelines issued by the Attorney General, each State shall include in its registration program residents who were convicted in another State and shall ensure that procedures are in place to accept registration information from—

(A) residents who were convicted in another State, convicted of a Federal offense, or sentenced by a court martial; and

(B) nonresident offenders who have crossed into another State in order to work or attend school.

(c) Registration of offender crossing State border

Any person who is required under this section to register in the State in which such person resides shall also register in any State in which the person is employed, carries on a vocation, or is a student.

(d) Penalty

A person required to register under a State program established pursuant to this section who knowingly fails to so register and keep such registration current shall be subject to criminal penalties in any State in which the person has so failed.

(e) Release of information

(1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State.

(2) The State or any agency authorized by the State shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released. The release of information under this paragraph shall include the maintenance of an Internet site containing such information that is available to the public and instructions on the process for correcting information that a person alleges to be erroneous.

(f) Immunity for good faith conduct

Law enforcement agencies, employees of law enforcement agencies and independent contractors acting at the direction of such agencies, and State officials shall

be immune from liability for good faith conduct under this section.

(g) Compliance

(1) Compliance date

Each State shall have not more than 3 years from September 13, 1994, in which to implement this section, except that the Attorney General may grant an additional 2 years to a State that is making good faith efforts to implement this section.

(2) Ineligibility for funds

(A) A State that fails to implement the program as described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 3756[1] of this title.

(B) REALLOCATION OF FUNDS.—Any funds that are not allocated for failure to comply with this section shall be reallocated to States that comply with this section.

(h) Fingerprints

Each requirement to register under this section shall be deemed to also require the submission of a set of fingerprints of the person required to register, obtained in accordance with regulations prescribed by the Attorney General under section 14072(h) of this title.

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[1] See References in Text note below.

(i) Grants to States for costs of compliance

(1) Program authorized

(A) In general

The Director of the Bureau of Justice Assistance (in this subsection referred to as the "Director") shall carry out a program, which shall be known as the "Sex Offender Management Assistance Program" (in this subsection referred to as the "SOMA program"), under which the Director shall award a grant to each eligible State to offset costs directly associated with complying with this section.

(B) Uses of funds

Each grant awarded under this subsection shall be—

(i) distributed directly to the State for distribution to State and local entities; and

(ii) used for training, salaries, equipment, materials, and other costs directly associated with complying with this section.

(2) Eligibility

(A) Application

To be eligible to receive a grant under this subsection, the chief executive of a State shall, on an annual basis, submit to the Director an application (in such form and containing such information as the Director may reasonably require) assuring that—

(i) the State complies with (or made a good faith effort to comply with) this section; and

(ii) where applicable, the State has penalties comparable to or greater than Federal penalties for crimes listed in this section, except that the Director may waive the requirement of this clause if a State demonstrates an overriding need for assistance under this subsection.

(B) Regulations

(i) In general

Not later than 90 days after October 30, 1998, the Director shall promulgate regulations to implement this subsection (including the information that must be included and the requirements that the States must meet) in submitting the applications required under this subsection. In allocating funds under this subsection, the Director may consider the annual number of sex offenders registered in each eligible State's monitoring and notification programs.

(ii) Certain training programs

Prior to implementing this subsection, the Director shall study the feasibility of incorporating into the SOMA program the activities of any technical assistance or training program established as a result of section 13941 of this title. In a case in which incorporating such activities into the SOMA program will eliminate duplication of efforts or administrative costs, the Director shall take administrative actions, as allowable, and make recommendations to Congress to incorpo-

rate such activities into the SOMA program prior to implementing the SOMA program.

(3) Authorization of appropriations

There is authorized to be appropriated for each of the fiscal years 2004 through 2007 such sums as may be necessary to carry out the provisions of section 3796dd(d)(10) of this title, as added by the PROTECT Act.[1]

(j) Notice of enrollment at or employment by institutions of higher education

(1) Notice by offenders

(A) In general

In addition to any other requirements of this section, any person who is required to register in a State shall provide notice as required under State law—

(i) of each institution of higher education in that State at which the person is employed, carries on a vocation, or is a student; and

(ii) of each change in enrollment or employment status of such person at an institution of higher education in that State.

(B) Change in status

A change in status under subparagraph (A)(ii) shall be reported by the person in the manner provided by State law. State procedures shall ensure that the updated information is promptly made available to a law enforcement agency having jurisdiction where such institution is located and en-

tered into the appropriate State records or data system.

(2) State reporting

State procedures shall ensure that the registration information collected under paragraph (1)—

(A) is promptly made available to a law enforcement agency having jurisdiction where such institution is located; and

(B) entered into the appropriate State records or data system.

(3) Request

Nothing in this subsection shall require an educational institution to request such information from any State.

4. 42 U.S.C. 14072 (2006, repealed effective 2009) provides:

FBI database

(a) Definitions

For purposes of this section—

(1) the term "FBI" means the Federal Bureau of Investigation;

(2) the terms "criminal offense against a victim who is a minor", "sexually violent offense", "sexually violent predator", "mental abnormality", "predatory", "employed, carries on a vocation", and "student" have

the same meanings as in section 14071(a)(3) of this title; and

(3) the term "minimally sufficient sexual offender registration program" means any State sexual offender registration program that—

(A) requires the registration of each offender who is convicted of an offense in a range of offenses specified by State law which is comparable to or exceeds that described in subparagraph (A) or (B) of section 14071(a)(1) of this title;

(B) participates in the national database established under subsection (b) of this section in conformity with guidelines issued by the Attorney General;

(C) provides for verification of address at least annually;[1]

(D) requires that each person who is required to register under subparagraph (A) shall do so for a period of not less than 10 years beginning on the date that such person was released from prison or placed on parole, supervised release, or probation.

(b) Establishment

The Attorney General shall establish a national database at the Federal Bureau of Investigation to track the whereabouts and movement of—

(1) each person who has been convicted of a criminal offense against a victim who is a minor;

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[1] So in original. Probably should be followed by "and".

(2) each person who has been convicted of a sexually violent offense; and

(3) each person who is a sexually violent predator.

(c) Registration requirement

Each person described in subsection (b) of this section who resides in a State that has not established a minimally sufficient sexual offender registration program shall register a current address, fingerprints of that person, and a current photograph of that person with the FBI for inclusion in the database established under subsection (b) of this section for the time period specified under subsection (d) of this section.

(d) Length of registration

A person described in subsection (b) of this section who is required to register under subsection (c) of this section shall, except during ensuing periods of incarceration, continue to comply with this section—

(1) until 10 years after the date on which the person was released from prison or placed on parole, supervised release, or probation; or

(2) for the life of the person, if that person—

(A) has 2 or more convictions for an offense described in subsection (b) of this section;

(B) has been convicted of aggravated sexual abuse, as defined in section 2241 of title 18 or in a comparable provision of State law; or

(C) has been determined to be a sexually violent predator.

(e) Verification

(1) Persons convicted of an offense against a minor or a sexually violent offense

In the case of a person required to register under subsection (c) of this section, the FBI shall, during the period in which the person is required to register under subsection (d) of this section, verify the person's address in accordance with guidelines that shall be promulgated by the Attorney General. Such guidelines shall ensure that address verification is accomplished with respect to these individuals and shall require the submission of fingerprints and photographs of the individual.

(2) Sexually violent predators

Paragraph (1) shall apply to a person described in subsection (b)(3) of this section, except that such person must verify the registration once every 90 days after the date of the initial release or commencement of parole of that person.

(f) Community notification

(1) In general

Subject to paragraph (2), the FBI may release relevant information concerning a person required to register under subsection (c) of this section that is necessary to protect the public.

(2) Identity of victim

In no case shall the FBI release the identity of any victim of an offense that requires registration by the offender with the FBI.

(g) Notification of FBI of changes in residence

(1) Establishment of new residence

For purposes of this section, a person shall be deemed to have established a new residence during any period in which that person resides for not less than 10 days.

(2) Persons required to register with the FBI

Each establishment of a new residence, including the initial establishment of a residence immediately following release from prison, or placement on parole, supervised release, or probation, by a person required to register under subsection (c) of this section shall be reported to the FBI not later than 10 days after that person establishes a new residence.

(3) Individual registration requirement

A person required to register under subsection (c) of this section or under a State sexual offender offender[2] registration program, including a program established under section 14071 of this title, who changes address to a State other than the State in which the person resided at the time of the immediately preceding registration shall, not later than 10 days after that person establishes a new residence, register a current address, fingerprints, and photograph of that person, for inclusion in the appropriate database, with—

[2] So in original.

(A) the FBI; and

(B) the State in which the new residence is established.

(4) State registration requirement

Any time any State agency in a State with a minimally sufficient sexual offender registration program, including a program established under section 14071 of this title, is notified of a change of address by a person required to register under such program within or outside of such State, the State shall notify—

(A) the law enforcement officials of the jurisdiction to which, and the jurisdiction from which, the person has relocated; and

(B) the FBI.

(5) Verification

(A) Notification of local law enforcement officials

The FBI shall ensure that State and local law enforcement officials of the jurisdiction from which, and the State and local law enforcement officials of the jurisdiction to which, a person required to register under subsection (c) of this section relocates are notified of the new residence of such person.

(B) Notification of FBI

A State agency receiving notification under this subsection shall notify the FBI of the new residence of the offender.

(C) Verification

(i) State agencies

If a State agency cannot verify the address of or locate a person required to register with a minimally sufficient sexual offender registration program, including a program established under section 14071 of this title, the State shall immediately notify the FBI.

(ii) FBI

If the FBI cannot verify the address of or locate a person required to register under subsection (c) of this section or if the FBI receives notification from a State under clause (i), the FBI shall—

(I) classify the person as being in violation of the registration requirements of the national database; and

(II) add the name of the person to the National Crime Information Center Wanted person file and create a wanted persons record: *Provided*, That an arrest warrant which meets the requirements for entry into the file is issued in connection with the violation.

(h) Fingerprints

(1) FBI registration

For each person required to register under subsection (c) of this section, fingerprints shall be obtained and verified by the FBI or a local law enforcement official pursuant to regulations issued by the Attorney General.

(2) State registration systems

In a State that has a minimally sufficient sexual offender registration program, including a program established under section 14071 of this title, fingerprints required to be registered with the FBI under this section shall be obtained and verified in accordance with State requirements. The State agency responsible for registration shall ensure that the fingerprints and all other information required to be registered is registered with the FBI.

(i) Penalty

A person who is—

(1) required to register under paragraph (1), (2), or (3) of subsection (g) of this section and knowingly fails to comply with this section;

(2) required to register under a sexual offender registration program in the person's State of residence and knowingly fails to register in any other State in which the person is employed, carries on a vocation, or is a student;

(3) described in section 4042(c)(4) of title 18, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation; or

(4) sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105–119, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation,

or is a student following release from prison or sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

(j) Release of information

The information collected by the FBI under this section shall be disclosed by the FBI—

(1) to Federal, State, and local criminal justice agencies for—

(A) law enforcement purposes; and

(B) community notification in accordance with section 14071(d)(3)[3] of this title; and

(2) to Federal, State, and local governmental agencies responsible for conducting employment-related background checks under section 5119a of this title.

(k) Notification upon release

Any State not having established a program described in subsection (a)(3) of this section must—

(1) upon release from prison, or placement on parole, supervised release, or probation, notify each offender who is convicted of an offense described in subparagraph (A) or (B) of section 14071(a)(1) of this title of their duty to register with the FBI; and

[3] See References in Text note below.

(2) notify the FBI of the release of each offender who is convicted of an offense described in subparagraph (A) or (B) of section 14071(a)(1) of this title.

5. 42 U.S.C. 16911 provides:

Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a))[4] of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

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[4] So in original. The second closing parenthesis probably should follow "18".

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term "sex offense" means—

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 16912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of Title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term "minor" means an individual who has not attained the age of 18 years.

6. 42 U.S.C. 16912 provides:

Registry requirements for jurisdictions

(a) Jurisdiction to maintain a registry

Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.

(b) Guidelines and regulations

The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.

7. 42 U.S.C. 16913 provides:

Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that infor-

mation to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

8. 42 U.S.C. 16914 provides:

Information required in registration

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Any other information required by the Attorney General.

(b) **Provided by the jurisdiction**

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

(1) A physical description of the sex offender.

(2) The text of the provision of law defining the criminal offense for which the sex offender is registered.

(3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.

(4) A current photograph of the sex offender.

(5) A set of fingerprints and palm prints of the sex offender.

(6) A DNA sample of the sex offender.

(7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

(8) Any other information required by the Attorney General.

9. 42 U.S.C. 16915 provides:

Duration of registration requirement

(a) Full registration period

A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b) of this section. The full registration period is—

(1) 15 years, if the offender is a tier I sex offender;

(2) 25 years, if the offender is a tier II sex offender; and

(3) the life of the offender, if the offender is a tier III sex offender.

(b) Reduced period for clean record

(1) Clean record

The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph (2) by—

(A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;

(B) not being convicted of any sex offense;

(C) successfully completing any periods of supervised release, probation, and parole; and

(D) successfully completing of[1] an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

(2) Period

In the case of—

(A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; and

(B) a tier III sex offender adjudicated delinquent for the offense which required registration in a sex registry under this subchapter, the period during which the clean record shall be maintained is 25 years.

(3) Reduction

In the case of—

(A) a tier I sex offender, the reduction is 5 years;

(B) a tier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record under paragraph (2) is maintained.

10. 42 U.S.C. 16916 provides:

Periodic in person verification

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than—

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[1] So in original. The word "of" probably should not appear.

(1) each year, if the offender is a tier I sex offender;

(2) every 6 months, if the offender is a tier II sex offender; and

(3) every 3 months, if the offender is a tier III sex offender.

11. 42 U.S.C. 16917 provides:

Duty to notify sex offenders of registration requirements and to register

(a) In general

An appropriate official shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register—

(1) inform the sex offender of the duties of a sex offender under this subchapter and explain those duties;

(2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and

(3) ensure that the sex offender is registered.

(b) Notification of sex offenders who cannot comply with subsection (a) of this section

The Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered in accordance with subsection (a) of this section.

12. 42 U.S.C. 16918 provides:

Public access to sex offender information through the Internet

(a) In general

Except as provided in this section, each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry. The jurisdiction shall maintain the Internet site in a manner that will permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user. The jurisdiction shall also include in the design of its Internet site all field search capabilities needed for full participation in the Dru Sjodin National Sex Offender Public Website and shall participate in that website as provided by the Attorney General.

(b) Mandatory exemptions

A jurisdiction shall exempt from disclosure—

(1) the identity of any victim of a sex offense;

(2) the Social Security number of the sex offender;

(3) any reference to arrests of the sex offender that did not result in conviction; and

(4) any other information exempted from disclosure by the Attorney General.

(c) Optional exemptions

A jurisdiction may exempt from disclosure—

(1) any information about a tier I sex offender convicted of an offense other than a specified offense against a minor;

(2) the name of an employer of the sex offender;

(3) the name of an educational institution where the sex offender is a student; and

(4) any other information exempted from disclosure by the Attorney General.

(d) Links

The site shall include, to the extent practicable, links to sex offender safety and education resources.

(e) Correction of errors

The site shall include instructions on how to seek correction of information that an individual contends is erroneous.

(f) Warning

The site shall include a warning that information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address. The warning shall note that any such action could result in civil or criminal penalties.

13. 42 U.S.C. 16919 provides:

National Sex Offender Registry

(a) Internet

The Attorney General shall maintain a national database at the Federal Bureau of Investigation for each sex offender and any other person required to register in a jurisdiction's sex offender registry. The database shall be known as the National Sex Offender Registry.

(b) Electronic forwarding

The Attorney General shall ensure (through the National Sex Offender Registry or otherwise) that updated information about a sex offender is immediately transmitted by electronic forwarding to all relevant jurisdictions.

14. 42 U.S.C. 16920 provides:

Dru Sjodin National Sex Offender Public Website

(a) Establishment

There is established the Dru Sjodin National Sex Offender Public Website (hereinafter in this section referred to as the "Website"), which the Attorney General shall maintain.

(b) Information to be provided

The Website shall include relevant information for each sex offender and other person listed on a jurisdiction's Internet site. The Website shall allow the public to obtain relevant information for each sex offender by a single query for any given zip code or geographical radius set by the user in a form and with such limitations as may be established by the Attorney General and shall have such other field search capabilities as the Attorney General may provide.

15. 42 U.S.C. 16921 provides:

Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program

(a) Establishment of Program

There is established the Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program (hereinafter in this section referred to as the "Program").

(b) Program notification

Except as provided in subsection (c) of this section, immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to the following:

(1) The Attorney General, who shall include that information in the National Sex Offender Registry or other appropriate databases.

(2) Appropriate law enforcement agencies (including probation agencies, if appropriate), and each school and public housing agency, in each area in which the individual resides, is an employee or is a student.

(3) Each jurisdiction where the sex offender resides, is an employee, or is a student, and each jurisdiction from or to which a change of residence, employment, or student status occurs.

(4) Any agency responsible for conducting employment-related background checks under section 5119a of this title.

(5) Social service entities responsible for protecting minors in the child welfare system.

(6) Volunteer organizations in which contact with minors or other vulnerable individuals might occur.

(7) Any organization, company, or individual who requests such notification pursuant to procedures established by the jurisdiction.

(c) Frequency

Notwithstanding subsection (b) of this section, an organization or individual described in subsection (b)(6) or (b)(7) of this section may opt to receive the notification described in that subsection no less frequently than once every five business days.

16. 42 U.S.C. 16922 provides:

Actions to be taken when sex offender fails to comply

An appropriate official shall notify the Attorney General and appropriate law enforcement agencies of any failure by a sex offender to comply with the requirements of a registry and revise the jurisdiction's registry to reflect the nature of that failure. The appropriate official, the Attorney General, and each such law enforcement agency shall take any appropriate action to ensure compliance.

17. 42 U.S.C. 16923 provides:

Development and availability of registry management and website software

(a) Duty to develop and support

The Attorney General shall, in consultation with the jurisdictions, develop and support software to enable jurisdictions to establish and operate uniform sex offender registries and Internet sites.

(b) Criteria

The software should facilitate—

(1) immediate exchange of information among jurisdictions;

(2) public access over the Internet to appropriate information, including the number of registered sex offenders in each jurisdiction on a current basis;

(3) full compliance with the requirements of this subchapter; and

(4) communication of information to community notification program participants as required under section 16921 of this title.

(C) Deadline

The Attorney General shall make the first complete edition of this software available to jurisdictions within 2 years of July 27, 2006.

18. 42 U.S.C. 16924 provides:

Period for implementation by jurisdictions

(a) Deadline

Each jurisdiction shall implement this subchapter before the later of—

(1) 3 years after July 27, 2006; and

(2) 1 year after the date on which the software described in section 16923 of this title is available.

(b) Extensions

The Attorney General may authorize up to two 1-year extensions of the deadline.

19. 42 U.S.C. 16925 provides:

Failure of jurisdiction to comply

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under part A of subchapter V of chapter 46 of this title.

(b) State constitutionality

(1) In general

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement cer-

tain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) Efforts

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

(3) Alternative procedures

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing[1] reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

(4) Funding reduction

If a jurisdiction does not comply with paragraph (3), then the jurisdiction shall be subject to a funding

[1] So in original. Probably should be followed by a comma.

reduction as specified in subsection (a) of this section.

(c) Reallocation

Amounts not allocated under a program referred to in this section to a jurisdiction for failure to substantially implement this subchapter shall be reallocated under that program to jurisdictions that have not failed to substantially implement this subchapter or may be reallocated to a jurisdiction from which they were withheld to be used solely for the purpose of implementing this subchapter.

(d) Rule of construction

The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.

20. 42 U.S.C. 16926 provides:

Sex Offender Management Assistance (SOMA) program

(a) In general

The Attorney General shall establish and implement a Sex Offender Management Assistance program (in this subchapter referred to as the "SOMA program"), under which the Attorney General may award a grant to a jurisdiction to offset the costs of implementing this subchapter.

(b) Application

The chief executive of a jurisdiction desiring a grant under this section shall, on an annual basis, submit to the Attorney General an application in such form and

containing such information as the Attorney General may require.

(c) Bonus payments for prompt compliance

A jurisdiction that, as determined by the Attorney General, has substantially implemented this subchapter not later than 2 years after July 27, 2006 is eligible for a bonus payment. The Attorney General may make such a payment under the SOMA program for the first fiscal year beginning after that determination. The amount of the payment shall be—

(1) 10 percent of the total received by the jurisdiction under the SOMA program for the preceding fiscal year, if that implementation is not later than 1 year after July 27, 2006; and

(2) 5 percent of such total, if not later than 2 years after July 27, 2006.

(d) Authorization of appropriations

In addition to any amounts otherwise authorized to be appropriated, there are authorized to be appropriated such sums as may be necessary to the Attorney General, to be available only for the SOMA program, for fiscal years 2007 through 2009.

21. 42 U.S.C. 16927 provides:

Election by Indian tribes

(a) Election

(1) In general

A federally recognized Indian tribe may, by resolution or other enactment of the tribal council or comparable governmental body—

(A) elect to carry out this part as a jurisdiction subject to its provisions; or

(B) elect to delegate its functions under this part to another jurisdiction or jurisdictions within which the territory of the tribe is located and to provide access to its territory and such other cooperation and assistance as may be needed to enable such other jurisdiction or jurisdictions to carry out and enforce the requirements of this part.

(2) Imputed election in certain cases

A tribe shall be treated as if it had made the election described in paragraph (1)(B) if—

(A) it is a tribe subject to the law enforcement jurisdiction of a State under section 1162 of Title 18;

(B) the tribe does not make an election under paragraph (1) within 1 year of July 27, 2006 or rescinds an election under paragraph (1)(A); or

(C) the Attorney General determines that the tribe has not substantially implemented the requirements of this part and is not likely to become capable of doing so within a reasonable amount of time.

(b) Cooperation between tribal authorities and other jurisdictions

(1) Nonduplication

A tribe subject to this part is not required to duplicate functions under this part which are fully carried out by another jurisdiction or jurisdictions within which the territory of the tribe is located.

(2) Cooperative agreements

A tribe may, through cooperative agreements with such a jurisdiction or jurisdictions—

(A) arrange for the tribe to carry out any function of such a jurisdiction under this part with respect to sex offenders subject to the tribe's jurisdiction; and

(B) arrange for such a jurisdiction to carry out any function of the tribe under this part with respect to sex offenders subject to the tribe's jurisdiction.

22. 42 U.S.C. 16928 provides:

Registration of sex offenders entering the United States

The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

23. 42 U.S.C. 16941 provides:

Federal assistance with respect to violations of registration requirements

(a) In general

The Attorney General shall use the resources of Federal law enforcement, including the United States Mar-

shals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements. For the purposes of section 566(e)(1)(B) of Title 28, a sex offender who violates a sex offender registration requirement shall be deemed a fugitive.

(b) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary for fiscal years 2007 through 2009 to implement this section.

24. Pub. L. No. 105-119, Tit. I, § 115(a)(8)(C), 111 Stat. 2466 (10 U.S.C. 951 note (2000)) provides:

(i) The Secretary of Defense shall specify categories of conduct punishable under the Uniform Code of Military Justice which encompass a range of conduct comparable to that described in section 170101(a)(3)(A) and (B) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071(a)(3)(A) and (B)), and such other conduct as the Secretary deems appropriate for inclusion for purposes of this subparagraph.

(ii) In relation to persons sentenced by a court martial for conduct in the categories specified under clause (i), the Secretary shall prescribe procedures and implement a system to—

(I) provide notice concerning the release from confinement or sentencing of such persons;

(II) inform such persons concerning registration obligations; and

(III) track and ensure compliance with registration requirements by such persons during any period

of parole, probation, or other conditional release or supervision related to the offense.

(iii) The procedures and requirements established by the Secretary under this subparagraph shall, to the maximum extent practicable, be consistent with those specified for Federal offenders under the amendments made by subparagraphs (A) and (B) [section 115(a)(8)(A), (B) of Pub. L. 105–119, amending sections 3563, 3583, 4042, and 4209 of Title 18, Crimes and Criminal Procedure].

(iv) If a person within the scope of this subparagraph is confined in a facility under the control of the Bureau of Prisons at the time of release, the Bureau of Prisons shall provide notice of release and inform the person concerning registration obligations under the procedures specified in section 4042(c) of title 18, United States Code.

OPPOSITION BRIEF

No. 12-418

In the Supreme Court of the United States

October Term, 2012

UNITED STATES OF AMERICA, PETITIONER,

v.

ANTHONY JAMES KEBODEAUX

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KEBODEAUX'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), which imposes registration requirements on those convicted of sex offenses under state or federal law. Both classes of offenders are subject to criminal penalties if they cross state lines to avoid registration. A federal offender, however, may be punished even without interstate travel. Kebodeaux is a federal offender by virtue of his 1999 military conviction for having consensual sex with a 15-year-old girl. In 2008, he was convicted under SORNA for a registration violation that occurred within the state of Texas—no interstate travel was involved. The Fifth Circuit ruled that the application of SORNA to Kebodeaux, through a regulation promulgated by the Attorney General, was impermissible. The questions presented by the Government are:

1. Whether the court of appeals erred in conducting its constitutional analysis on the premise that Kebodeaux was not under a federal registration obligation until 2006, when SORNA was enacted.[1]

2. Whether the court of appeals correctly concluded that SORNA, as applied through 28 C.F.R. § 72.3 to a person who completed his federal criminal sentence before SORNA's enactment, exceeded Congress's Article I authority.

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1. The Government's first question presented misstates the premise of the *Kebodeaux* decision. *Kebodeaux* is based on this Court's analysis in *United States v. Comstock*, 130 S. Ct. 1949 (2010), as well as this Court's Commerce Clause precedent. The short history of pre-SORNA sex offender registration laws was but one factor of the *Comstock* analysis—it was not the premise of the court's ruling.

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Orders, *United States v. Brunner*, No. 11-2115 (2d Cir. July 9, 2012 & July 11, 2012), ECF Nos. 51, 54. 28

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BRIEF IN OPPOSITION

Anthony James Kebodeaux respectfully asks this Court to deny the Government's petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Commerce Clause, the Military Clause, and the Necessary and Proper Clause, quoted in the Government's petition for certiorari, Pet. at 2, Kebodeaux's case involves the Tenth Amendment to the U.S. Constitution. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

FEDERAL REGULATION INVOLVED

The Attorney General's regulation, 28 C.F.R. § 72.3, provides:

> The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

STATEMENT

In 1999, when Kebodeaux was a 21-year-old airman in the United States Air Force, he had a consensual sexual relationship with a 15-year-old girl. Pet. App. A at 2a. Based on that relationship, a military court found him guilty of carnal knowledge involving a female under the age of 16, in violation of Article

120 of the Uniform Code of Military Justice. The court sentenced Kebodeaux to three months' confinement and a bad conduct discharge for this offense and for violating the lawful orders of his superiors. Kebodeaux fully served that sentence and returned to his home in Texas in 1999.[2]

Nearly 10 years later, Kebodeaux was convicted under SORNA for failing to update his sex-offender registration, after the Attorney General promulgated a regulation making SORNA applicable to those who committed offenses before its 2006 enactment. The Fifth Circuit Court of Appeals reversed Kebodeaux's conviction "on narrow grounds." Pet. App. A at 3a. The court concluded that, "under the unusual circumstances" of Kebodeaux's case, *id.* at 7a, as well as "the specific and limited facts" presented, Kebodeaux's 1999 federal crime was "an insufficient basis for Congress to assert unending criminal authority over him" through SORNA, *id.* at 2a.

a. ***SORNA.***

Congress enacted SORNA as part of the Adam Walsh Child Protection and Safety Act of 2006 (AWA). *See* Pub. L. 109-248, § 1, tit. I, 120 Stat. 587, 590–611. Among other things, that legislation imposed registration requirements on sex offenders, SORNA § 113, 120 Stat. at 593–94 (codified at 42 U.S.C. § 16913), and created a criminal offense to punish those who violate

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2. Military records show that Kebodeaux's three-month sentence was adjudged on May 17, 1999, and that he had returned to Texas by September 18, 1999, when his bad conduct discharge was executed.

the registration requirements, SORNA § 141, 120 Stat. at 602 (codified at 18 U.S.C. § 2250). The criminal punishment provision states:

> § 2250. Failure to register
>
> (a) In general.—Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

Section 2250(a)(1) applies to those "required to register" under SORNA. Those required to register are sex offenders. 42 U.S.C. § 16913(a). A "sex offender" is anyone who has been "convicted of a sex offense[,]" 42 U.S.C. § 16911(1), under state, local, tribal, federal, military, and some foreign law provisions. *Id.* § 16911(1), (5)(A), (5)(B), (6).

Congress delegated to the Attorney General the authority to determine whether and when SORNA would apply retroactively to sex offenders convicted before SORNA's passage. 42 U.S.C. § 16913(d); *Reynolds v. United States*, 132 S. Ct. 975 (2012). The Attorney General did so, issuing a regulation making

SORNA applicable to all sex offenders, including those convicted before SORNA's 2006 enactment. *See* 28 C.F.R. § 72.3.[3]

b. *Kebodeaux's SORNA conviction.*

In August 2007, Kebodeaux updated his registration as a sex offender pursuant to Texas law, when he moved from San Antonio, Texas, to El Paso, Texas. *See* Pet. App. F at 166a–69a. He returned to San Antonio shortly afterwards. *Id.* at 168a–69a. Kebodeaux did not inform the El Paso Police Department that he was leaving, and he did not register with San Antonio authorities upon his return. *Id.*

A federal grand jury indicted Kebodeaux for failing to register and update his sex offender registration, as required by SORNA. The indictment alleged his prior military conviction; it did not charge that he crossed state lines. His motion to dismiss the indictment on constitutional grounds was denied. A district court convicted Kebodeaux of failing to register, as required by SORNA, and sentenced him to one year and one day of confinement. Pet. App. A at 2a–3a; App. F.

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3. Under Fifth Circuit law addressing the regulation, SORNA applied retroactively to Kebodeaux, whose failure-to-register offense occurred in August 2007. *See United States v. Johnson*, 632 F.3d 912, 930–33 (5th Cir.) (applying SORNA to pre-enactment offenders whose failure to register occurred after March 30, 2007), *cert. denied*, 132 S. Ct. 135 (2011). The circuits are divided, however, about what date triggers SORNA's application to pre-enactment offenders like Kebodeaux—an issue not yet decided by this Court. *See, e.g., United States v. Stevenson*, 676 F.3d 557, 562 (6th Cir.) (SORNA applicable to pre-enactment offenders as of August 1, 2008), *cert. denied*, 133 S. Ct. 168 (2012).

c. ***Kebodeaux's Appeal to the Fifth Circuit.***

Kebodeaux appealed, challenging the constitutionality of his conviction. After a panel of the Fifth Circuit Court of Appeals rejected that challenge, the court decided to hear the case en banc. Pet. App. B at 74a. Kebodeaux argued that neither the Constitution's Military Clause, nor the Commerce Clause, nor the Necessary and Proper Clause justified the application of SORNA to his intrastate failure to update his registration. Kebodeaux's Supplemental Brief on Rehearing En Banc at 10–36, *United States v. Kebodeaux*, No. 08-51185 (5th Cir. Aug. 16, 2011). The Government contended that SORNA's application was justified as necessary and proper to its "authority to enact laws for the responsible operation of a federal penal system[,[" and under the Commerce Clause. En Banc Brief of the United States at 13–14, *Kebodeaux*, No. 08-51185 (5th Cir. Sept. 7, 2011).

The en banc court ruled that SORNA, "interpreted by the Attorney General" to apply to pre-enactment offenders, was unconstitutional as applied to Kebodeaux, "under the specific and limited facts of his case[.]" Pet. App. A at 2a. Those facts were that Kebodeaux had "served his sentence and . . . been unconditionally released from prison and the military" in 1999. *Id.* at 2a–3a. In such circumstances, Congress lacked a "jurisdictional hook" to subject Kebodeaux to SORNA's provisions governing the failure to register after intrastate travel. *Id.* at 3a. Accordingly, the court's "finding of

unconstitutionality . . . does not affect the registration requirements for . . . any federal sex offender who was in prison or on supervised release when the statute was enacted in 2006 or . . . any federal sex offender convicted since then." *Id.* at 4a. Neither does it affect any offender—state or federal—who crosses state lines and then fails to register. *See id.* at 42a (former federal offenders may still be "regulated just as state sex offenders currently are [regulated] under federal law").

The Fifth Circuit relied on *United States v. Comstock*, 130 S. Ct. 1949 (2010), to reach these conclusions. *See* Pet. App. A at 6a–24a. *Comstock* upheld the constitutionality of 18 U.S.C. § 4248, which permits the civil commitment of inmates "currently 'in the custody of the [Federal] Bureau of Prisons,'" beyond the date they would otherwise be released, if they are mentally ill and sexually dangerous. 130 S. Ct. at 1954. Unlike the federal inmates in *Comstock*, Kebodeaux's federal sentence had expired, and he had been "unconditionally released" from federal custody. Pet. App. A at 6a. By "unconditionally released," the court meant that Kebodeaux was not "in prison or on supervised release[,]" *id.* at 4a; nor was he subject to federal sex-offender registration requirements as "a condition of [his] release from prison," *id.* at 11a. In these circumstances, the court ruled, the federal government lacks authority to "reassert jurisdiction over someone it had long ago unconditionally released from custody just because he once committed a federal crime." *Id.* at 11a; *see*

also id. at 16a n.28 (noting Government's concession in *Comstock* that it lacks power to commit a person who has been "'released from prison and whose period of supervised release is also completed'").

The court of appeals also rejected the Government's "alternative argument" that SORNA's registration and penalty provisions are "necessary and proper to effect Congress's Commerce Clause power." *Id.* at 24a–25a. The Government's theory was that Congress has the authority to impose sex-offender registration requirements on Kebodeaux as "part of its broader regulation of interstate commerce[,]" and to punish him for failing to comply, whether or not he traveled in interstate commerce. Gov't En Banc Br. at 29. Because Congress has the power to punish those who travel in interstate commerce to avoid sex-offender registration, the Government reasoned, it also has the power to punish those who avoid registration, but do not travel across state lines to do so. *Id.* at 29–44.

The Fifth Circuit disagreed that criminal activity occurring within a state—and not involving interstate commerce—is subject to federal prosecution. Pet. App. A at 24a–41a. Congress, the court acknowledged, has the authority to regulate the use of the channels of interstate commerce so that "those channels will not become the means of promoting or spreading evil[.]" *Id.* at 26a (quoting *N. Am. Co. v. SEC*, 327 U.S. 686, 705 (1946)). But that does not mean that "Congress's 'police power' over those who use the channels of interstate commerce" can be extended "to punish those who are not presently using them

but might do so." Pet. App. A at 30a. Kebodeaux did not use the channels of interstate commerce to avoid sex-offender registration requirements. As applied to Kebodeaux, SORNA punished one who was not using the channels of interstate commerce, "but might do so." *Id.* To permit federal jurisdiction to rest on this basis would permit the "federal government [to] regulate anyone . . . who might someday travel interstate." *Id.* at 31a. That, the court ruled, "would violate basic tenets of federalism." *Id.* at 34a.

The court of appeals also rejected the Government's theory that Congress's Commerce-Clause "power to regulate instrumentalities of interstate commerce or persons or things in interstate commerce" provided authority to apply SORNA to Kebodeaux's intrastate failure to register. Gov't En Banc Br. at 30–31. "[T]hough Congress may protect the instrumentalities of, and persons and things in, interstate commerce from intrastate threats, those threats must be 'directed at' the instrumentalities of, or persons or things in, interstate commerce[.]" Pet. App. A at 36a (quoting *United States v. Morrison*, 529 U.S. 598, 618 (2000)). The threats "cannot just be a general threat to society of the sort that sex offenders pose." Pet. App. A at 36a. Addressing those sorts of threats is "the province of the States." *Id.* at 36a (quoting *Morrison*, 529 U.S. at 618).

The court rejected the Government's additional theory that SORNA, as applied to Kebodeaux, could be considered legislation that regulates activities

that substantially affect interstate commerce. *See* Gov't En Banc Br. at 39–41. SORNA "regulates non-economic, intrastate conduct that is not 'an essential part of a larger regulation of economic activity.'" Pet. App. A at 38a (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)). "It is a criminal statute that 'by its terms has nothing to do with "commerce" or any sort of economic enterprise[.]'" *Id.* at 38a–39a (quoting *Morrison*, 529 U.S. at 610). For those reasons, the court concluded that, to uphold Kebodeaux's conviction under "a non-commercial statute regulating purely intrastate conduct constitutional would read the word 'commerce' out of the Commerce Clause." *Id.* at 39a.

In sum, the Fifth Circuit held that SORNA's "registration requirements" and its "criminal penalties for failing to register after intrastate location are unconstitutional solely as they apply to former federal sex offenders who had been unconditionally released from federal custody before SORNA's passage in 2006." *Id.* at 41a. As to these offenders, SORNA is "an unlawful expansion of federal power at the expense of the well-recognized police power of the state." *Id.* at 42a.

REASONS FOR DENYING THE PETITION

The Government asks this Court to review *Kebodeaux* "[n]otwithstanding the potentially limited practical effect" of that decision. Pet. at 31. *Kebodeaux*'s limited effect is one reason to deny the petition. Another is that this case is a poor vehicle for deciding the questions presented. It does not clearly or cleanly

present the issues the Government's petition claims. Finally, the Fifth Circuit's decision is correct on the merits and should not be disturbed.

I. THE VERY LIMITED EFFECT OF THE DECISION IN *KEBODEAUX* MAKES THE QUESTIONS PRESENTED UNWORTHY OF THIS COURT'S REVIEW.

This Court exercises its power to grant certiorari "sparingly." *Camreta v. Greene*, 131 S. Ct. 2020, 2033 (2011) (quoting *Forsyth v. Hammond*, 166 U.S. 506, 514 (1897)). Review generally will be granted "only when the circumstances of the case satisfy [the Court] that the importance of the question involved, [or] the necessity of avoiding conflict [in the lower courts] . . . demands" the exercise of the power to grant certiorari. *Id.* (quoting *Forsyth*, 166 U.S. at 514–15) (first brackets added).

The Fifth Circuit Court of Appeals decided *Kebodeaux* on "narrow grounds," based on Kebodeaux's "unusual circumstances," as well as "the specific and limited facts" presented by his case. Pet. App. A at 2a, 3a, 7a. For that reason, the case will have limited practical effect, as the Government concedes. Pet. at 31. Accordingly, the questions presented in Kebodeaux's case are not of sufficient importance to warrant this Court's review. Nor does the case embody a conflict among the lower courts, or present a matter affecting the interests of the nation.

A. Kebodeaux's Case Is Not of Sufficient Importance to Warrant This Court's Review.

The Government asks this Court to grant review because the Fifth Circuit "invalidated certain applications of [SORNA,] an important Act of Congress." Pet. at 28. The court did not, however, invalidate any of SORNA's statutory language. That is because SORNA applied to Kebodeaux only by virtue of a regulation promulgated by the Attorney General. *See* Pet. App. A at 2a n.1 ("Because Kebodeaux committed his offense before SORNA's passage, his duty to register comes from the Attorney General's regulation rather than the statute itself.") Invalidating that regulatory application of SORNA to Kebodeaux leaves SORNA's statutory language intact, making the Fifth Circuit's decision less important than it otherwise might have been.

Congress did not make SORNA applicable to offenders, like Kebodeaux, whose sex offense occurred before SORNA's 2006 enactment. Instead, it delegated to the Attorney General the authority to apply SORNA's registration requirements to pre-Act offenders. *See* 42 U.S.C. § 16913(d) ("The Attorney General shall have the authority to specify the applicability of the [registration] requirements . . . to sex offenders convicted before the enactment" of SORNA); *Reynolds v. United States*, 132 S. Ct. 975, 979 (2012) (SORNA's "registration requirements do not apply to pre-Act offenders until the Attorney General specifies that they do apply").

The Attorney General did so by promulgating a regulation that provides: "The requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA]." 28 C.F.R. § 72.3. Because SORNA's applicability to Kebodeaux rested on this regulation, the Fifth Circuit ruled that SORNA, "interpreted by the Attorney General" to apply to pre-Act offenders like Kebodeaux, was unconstitutional as applied to him. Pet. App. A at 2a.

Because SORNA applies to Kebodeaux by virtue of a federal regulation, the Fifth Circuit's ruling does not invalidate SORNA's statutory language. By its terms, SORNA imposes an initial registration requirement on federal offenders who were in custody, or being sentenced at the time of SORNA's passage. *See* 42 U.S.C. § 16913(b)(1), (2) (initial registration required "before completing a sentence of imprisonment" for a sex offense, or "not later than 3 business days after being sentenced for that offense, if . . . not sentenced to a term of imprisonment"). These initial registration requirements, which did not apply to Kebodeaux because he satisfied his federal sentence in 1999, remain intact.

SORNA's general registration requirements, as well as its requirement to keep registration current, also remain intact. *See* 42 U.S.C. § 16913(a), (c). *Kebodeaux* invalidated the application of those provisions only as to certain pre-Act federal offenders who are subject to SORNA under the Attorney General's regulation. *Kebodeaux* accordingly "does not affect the registration

requirements for (1) any federal sex offender who was in prison or on supervised release when the statute was enacted in 2006 or (2) any federal sex offender convicted since then." Pet. App. A at 4a. Nor does it exclude from SORNA's coverage those federal offenders whose "release from custody" is conditioned upon their compliance with sex offender registration requirements. *Id.* at 3a. Most important, federal offenders like Kebodeaux are still subject to SORNA's requirements if they cross state lines to avoid registration, regardless whether their convictions predated SORNA's 2006 passage. *See id.* at 5a (federal offenders like Kebodeaux may be regulated "exactly as all state sex offenders already are [regulated] under federal law"). This last limitation on the court's ruling is especially significant, considering that "the great majority of [SORNA] prosecutions that the government has brought" are based on allegations of interstate travel, and do not depend solely on the existence of a pre-Act federal conviction. Pet. at 30.

The punishment provisions in 18 U.S.C. § 2250 are similarly unaffected by *Kebodeaux*. Those provisions apply to one who "is required to register under [SORNA.]" 18 U.S.C. § 2250(a)(1). The persons required to register are defined by 42 U.S.C. § 16913. As that registration provision remains intact, so does § 2250, which relies on it.

Kebodeaux did not invalidate SORNA as unconstitutional—it invalidated only the Attorney General's application of SORNA to specific pre-Act federal

offenders. The Attorney General has already once modified the regulation governing SORNA's application to pre-Act offenders to avoid any inconsistency with this Court's decision in *Carr v. United States*, 130 S. Ct. 2229 (2010). *See* APPLICABILITY OF THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT, 75 Fed. Reg. 81,849, 81,852–53 (Dec. 29, 2010) (making "clarifying change in the interim rule[,]" 28 C.F.R. 72.3, ex. 2, to avoid inconsistency with *Carr*). A similar modification could be undertaken to avoid inconsistency with *Kebodeaux*, thus obviating the issues urged by the Government here. Because regulations can be so easily changed, cases that invalidate a regulation, as opposed to a statute, generally pose less significant questions. *Cf. Kickapoo Traditional Tribe v. Texas*, 555 U.S. 811 (2008) (denying certiorari in case that invalidated regulations issued under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.); *Shalala v. Health Ins. Ass'n of America*, 513 U.S. 1147 (1995) (denying certiorari in case that invalidated Medicare regulations).

In any event, cases involving the narrow class of offenders affected by *Kebodeaux* arise too infrequently to warrant this Court's review. Indeed, prosecutions like Kebodeaux's should diminish even more, over time, as more offenders become subject to SORNA by virtue of their conditional release from custody or commission of a sex offense after 2006.

For all these reasons, *Kebodeaux* has "limited practical effect[,]" as the Government's concedes. Pet. at 31. The decision is not of sufficient importance to warrant this Court's review.

B. Kebodeaux's Case Does Not Involve a Circuit Split.

The Government acknowledges that the *Kebodeaux* decision "is the first from a court of appeals to address the constitutionality" of SORNA, as it applies to former federal offenders through the Attorney General's regulation. Pet. at 29. But it urges the Court to review *Kebodeaux* "even in the absence of a circuit split." *Id.* at 28. This is reason to deny the Government's petition—not to grant it. *See Greene*, 131 S. Ct. at 2033 (certiorari granted "sparingly," as when necessary to avoid conflict among the courts of appeals).

After the Government filed its petition for certiorari, the Ninth Circuit decided *United States v. Elk Shoulder*, 696 F.3d 922 (9th Cir. 2012). In that case, a panel of the court of appeals rejected a constitutional challenge to SORNA, noting its disagreement with the reasoning in *Kebodeaux*. *Id.* at 931–32. The Ninth Circuit's criticism of *Kebodeaux* does not create a circuit split, however—the disagreement was *dicta*, as the court acknowledged that "*Kebodeaux*'s specific holding is not applicable" in Elk Shoulder's case *Id.* at 931 n.10.

Kebodeaux was not applicable in *Elk Shoulder* because the Fifth Circuit's holding "does not affect the registration requirements for . . . any federal sex

offender who was in prison or on supervised release when the statute was enacted in 2006[.]" Pet. App. A at 4a. Elk Shoulder was on supervised release in July 2006, and imprisoned for a violation of that release in August 2006. *Elk Shoulder*, 696 F.3d at 924. Accordingly, he was on supervised release when SORNA was enacted, and imprisoned after SORNA's passage—both circumstances that exclude him from the small class of offenders affected by *Kebodeaux*.

In upholding SORNA's application to Elk Shoulder, the Ninth Circuit said that it joined the Tenth Circuit in finding SORNA's registration and punishment provisions constitutional. *Elk Shoulder*, 696 F.3d at 931 (citing *United States v. Yelloweagle*, 643 F.3d 1275 (10th Cir. 2011), *cert. denied* 132 S. Ct. 1969 (2012); *United States v. Carel*, 668 F.3d 1211 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 2122 (2012)). Like Elk Shoulder, the defendants in *Yelloweagle*[4] and *Carel*[5] were on supervised release when SORNA was enacted, thus distinguishing those cases from *Kebodeaux*. Accordingly, there is no split of circuit authority on the issue whether SORNA's federal offender provisions

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4. 643 F.3d at 1278. *Yelloweagle* proceeded on the assumption that the registration requirement was constitutional, another factor that distinguishes it from *Kebodeaux*. *See* Pet. App. A at 30a n.44 (distinguishing *Yelloweagle*).

5. 668 F.3d at 1212, 1215 ("we hold that as applied to Mr. Carel—a federal sex offender on supervised release—§ 16913 is a constitutional exercise of Congress's authority").

apply to one who served his sentence and was unconditionally released from federal custody before July 27, 2006—SORNA's enactment date.

There is a final factor to consider about *Elk Shoulder*. New counsel has been appointed for Elk Shoulder's appeal, and the Ninth Circuit has *sua sponte* extended the date for filing a petition for rehearing or for rehearing en banc until January 4, 2013. *See* Order, *United States v. Elk Shoulder*, No. 10-30072 (9th Cir. Nov. 7, 2012), ECF No. 44. Reconsideration of that opinion thus may soon be underway in the Ninth Circuit.

II. KEBODEAUX'S CASE IS A POOR VEHICLE FOR DECIDING THE QUESTIONS PRESENTED.

Four factors make Kebodeaux's case a poor vehicle for reviewing the questions presented by the Government: (1) the Government's first question presented rests on an incorrect premise—the Fifth Circuit did not, as the Government claims, base its constitutional analysis on a mistaken understanding of pre-SORNA sex offender registration law; (2) the Government relies on statutory and constitutional provisions that were either not raised at all, or were inadequately litigated below; (3) the issues raised by the Government are not ripe for this Court's review; and (4) there is an adequate alternative basis for affirming the Fifth Circuit's decision that pretermits consideration of the issues raised by the Government.

1. The Government's first question presented incorrectly identifies the basis of the Fifth Circuit's decision in *Kebodeaux*. The Government's first question presented asserts that the Fifth Circuit erred by conducting its constitutional analysis on the premise that Kebodeaux was not subject to a federal registration obligation until SORNA was enacted in 2006. Pet. at (I). This, the Government claims, was the "linchpin" of the court's decision. Pet. at 22. The Government is wrong.

Pre-SORNA sex offender registration law was not the linchpin of the Fifth Circuit's analysis. Instead, the court based its constitutional analysis on the factors set out in this Court's decision in *United States v. Comstock*, 130 S. Ct. 1949 (2010), as well as the Court's Commerce Clause jurisprudence.[6] One of the factors considered in *Comstock* is the history of federal involvement in the area of the law under review. In *Comstock*, it was the history of mental health treatment for federal prisoners. 130 S. Ct. at 1958–61. In *Kebodeaux*, it was the history of sex offender registration laws. As part of the Fifth Circuit's review of that history, the court noted that "SORNA's sex-offender-registration requirements have a short history: They have existed only since 2006, and federal law relating to sex-offender registration only since 1994." Pet. App. A

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6. *Comstock* is cited, at the beginning of the court's legal analysis, as being the "most analogous Supreme Court decision" addressing the issues presented by Kebodeaux's case. Pet. App. A at 6a. The discussion of *Comstock* spans another 18 pages, until the court begins its Commerce-Clause analysis. *See id.* at 6a–24a.

at 10a. Accordingly, the court's view of pre-SORNA sex-offender-registration law was but one factor it considered—not the linchpin of its analysis.

As part of the *Comstock* analysis, the Fifth Circuit also considered the fact that Kebodeaux had already been "unconditionally released from prison and the military" when SORNA was enacted in 2006. *Id.* at 3a. By "unconditionally released," the court meant that Kebodeaux was no longer "in prison or on supervised release[,]" *id.* at 4a; nor was he required to register as a sex offender as a "condition[ ]" of his "release from custody[.]" *Id.* at 3a.[7] The Government, however, attributes a different meaning to the court's use of the term "unconditional release." In the Government's view, unconditional release means release free from any federal sex-offender-registration requirement. *See* Pet. at 17–18 (equating "unconditionally released" with absence of federal registration requirement).

Having created this false equivalence, the Government argues that the Fifth Circuit erred in finding that Kebodeaux had been unconditionally released from federal custody in 1999, because Kebodeaux had, in fact, been subject to a pre-SORNA federal registration requirement. Pet. at 17–24. On this point too, the Government is incorrect. Kebodeaux was not under a federal sex offender

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7. Under SORNA, federal sex offenders are required to serve a minimum term of five years' supervised release after their imprisonment term is complete. 18 U.S.C. § 3583(k). By law, those subject to supervised release must "comply with the requirements of" SORNA. 18 U.S.C. § 3583(d).

registration requirement when he was released from custody in 1999. *See infra* Part II. 2. a.

Whether or not such a federal registration requirement existed, however, the outcome in *Kebodeaux* would have been the same. Indeed, the Fifth Circuit addressed the absence of a pre-SORNA federal registration requirement only in a footnote in its opinion—signaling its lack of importance to the court's decision. *See* Pet. App. A at 4a n.4. And the court mentioned that alleged requirement only to address dissenting judges' view of pre-SORNA registration law—a point of more importance to those judges than to the majority. *See id.*

The Fifth Circuit's focus was on Kebodeaux's unconditional release from imprisonment in 1999: "We do not call into question Congress's ability to impose conditions on a prisoner's release from custody, including requirements that sex offenders register . . . . *After* the federal Government has *unconditionally* let a person free, however," his prior commission of a federal offense does not give the Government perpetual jurisdiction over him. *Id.* at 3a–4a. Kebodeaux was unconditionally released from federal custody in 1999. He was not conditionally released on supervised release, nor was his release conditioned on his compliance with a sex offender registration requirement. Under the principles set forth in *Comstock*, this factor, combined with others, showed that the Attorney General improperly extended SORNA's provisions to those like

Kebodeaux, who had already been unconditionally released from federal custody when SORNA was enacted in 2006.

For these reasons, the Government's first question presented is not actually presented by this case. The court of appeals did not premise its constitutional analysis on a misunderstanding of pre-SORNA registration law.

2. The Government relies on statutory and constitutional provisions that were either not raised at all, or were inadequately litigated below. The focus of the Government's first question presented— pre-SORNA registration law—raises issues that were neither cleanly raised nor adequately argued below. As for its second question presented, that too raises a new issue in this Court: the Spending Clause as a source of congressional authority for SORNA. The Government did not raise the Spending Clause argument at all in the court below. Both these factors make Kebodeaux's case a poor vehicle for deciding the questions presented by the Government.

a. ***Pre-SORNA sex-offender-registration law.*** The Government's en banc brief asserted, in a footnote, that pre-SORNA federal law required Kebodeaux to register as a sex offender in 1999. Gov't En Banc Br. at 24, n.5 (citing 42 U.S.C. § 14072(i)(3)). Some dissenting judges agreed with this assertion. Pet. App. A at 66a–70a (Haynes, J., dissenting). A concurring judge cited a different statutory provision, 42 U.S.C. § 14072(i)(4), Pet. App. A at 42a–44a (Owen, J., concurring), which the Government now relies on, conceding

that it "did not rely on . . . in the court of appeals[.]" Pet. at 19–20 & n.7. The majority opinion in *Kebodeaux* rejected the Government's footnoted argument in a footnote of its own—signaling both its lack of importance to the court's decision, as well as the absence of adequate litigation of an issue that the Government now submits as the premise of its first question presented. Pet. at (I), 17–24. This is far too thorny and fact-bound a question to be litigated for the first time in this Court.

For example, the pre-SORNA law that the Government now relies upon, 42 U.S.C. §§ 14072(i)(3) and (i)(4), did not actually impose federal *registration* requirements. *See* Pet. at 18–22. Instead, the law prescribed federal penalties for an offender who failed to register as required by state law. Section 14072(i), entitled "Penalty," provided imprisonment terms under subsections (3) and (4) for certain persons who "knowingly fail[ ] to register *in any State*" in which they reside, work, or attend school. 42 U.S.C. § 14072(i)(3), (4) (emphasis added). The states were required to maintain sex offender registries compliant with federal guidelines as a condition of federal funding. 42 U.S.C. § 14071(g)(2)(A). But there was no free-standing federal registration requirement, as there is in SORNA. *See* 42 U.S.C. § 16913(a) ("A sex offender shall register . . . in each jurisdiction where the offender resides," works, or is a student).

Indeed, the Government concedes as much by carefully crafting its argument to say that the Fifth Circuit "Erroneously Concluded That Respondent

Was Not Already Subject to A *Federal Penalty* . . . When He Completed The Sentence Imposed For His Federal Sex Offense[.]" Pet. at 17 (emphasis added).[8] To maintain its contention that pre-SORNA "federal *registration* requirements" were "imposed . . . by virtue of 42 U.S.C. 14072(i)(3) and (i)(4) (2006)[,]" the Government is forced to argue that "the criminal provisions for failure to register constituted 'federal registration requirements.'" Pet. at 21 (emphasis added). Accordingly, the Government's argument is that the existence of a penalty for failing to register according to state law was equivalent to a separate federal registration requirement. This loses sight of the argument that the Government began with: the Fifth Circuit erred in concluding that Kebodeaux was not subject to a federal registration obligation under pre-SORNA law. Pet. at (I). The reality is that Kebodeaux was not under such an obligation because that obligation did not exist—only by saying that a federal penalty is equivalent to a federal registration requirement can the Government support the premise of its first question presented.

Even if sections 14072(i)(3) and (i)(4) could be construed to have imposed a registration requirement—and Kebodeaux contends they cannot—neither provision applied to Kebodeaux at the time he completed his sentence and was discharged from the military in 1999. By its terms, § 14072(i)(3) did not apply

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8. In fact, the Fifth Circuit concluded that Kebodeaux "was not subject to federal *registration* requirements." Pet. App. A at 5a n.4 (emphasis added).

to persons, like Kebodeaux, who were in military custody. It applied to "[a] person who is . . . described in section 4042(c)(4) of title 18[.]" 42 U.S.C. § 14072(i)(3). Title 18, United States Code, § 4042 is captioned "Duties of Bureau of Prisons," and addresses, among other things, the Bureau of Prisons' (BOP) obligation to notify state and local authorities when it releases prisoners from BOP custody. Accordingly, the persons "described in section 4042(c)(4)" were those in BOP custody, not those in the custody of military authorities. Indeed, 18 U.S.C. § 4042(d) expressly states that "[t]his section shall not apply to military or naval penal or correctional institutions or the persons confined therein." Kebodeaux was confined in military custody. He was not a person described in 18 U.S.C. § 4042(c)(4) because he was not in BOP custody.[9] Therefore, Kebodeaux was not subject to § 14072(i)(3)—whether the Government chooses to call it a registration requirement, or to recognize it for what it is, a penalty provision.

Title 42, section 14072(i)(4)—never cited by the Government in the Fifth Circuit—did apply to military offenders. That provision covered "[a] person who is . . . sentenced by a court martial for conduct in a category specified by the Secretary of Defense under Section 115(a)(8)(C) of title I of Public Law 105-

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9. Although arguing otherwise here, the Government implicitly acknowledged this point in its en banc brief before the Fifth Circuit: "Section 4042(c) applies directly to sex offenders released from Bureau of Prisons Facilities, *as opposed to military facilities*. 18 U.S.C. § 4042(d)." Gov't En Banc Br. at 18 n.3 (emphasis added). Other pre-SORNA provisions "provide[ ] parallel requirements regarding sex offenders released *from military custody*." *Id.* (emphasis added).

119[.]" 42 U.S.C. § 14072(i)(4). It appears, however, that § 14072(i)(4) did not apply to Kebodeaux when he was released from custody and discharged from the Air Force on September 18, 1999.[10] Section 115(a)(8)(C) of the 1998 Appropriations Act directed the Secretary of Defense to specify categories of offenses under the Uniform Code of Military Justice (UCMJ) comparable to the state offenses for which federal law obliged states to require registration; to implement procedures to notify military sex offenders of their obligation to register; and to notify state and local authorities upon the release of those offenders. 1998 Appropriations Act § 115(a)(8)(C)(i), (ii), 111 Stat. at 2466 (codified at 10 U.S.C. § 951, note). The Acting Assistant Secretary of Defense issued a "directive-type memorandum" on December 23, 1998, prescribing such procedures and specifying carnal knowledge under Article 120 of the UCMJ as an offense covered by them. Pet. App. G at 172a. But it is, at best, unclear whether those procedures were actually in effect at the time of Kebodeaux's discharge on September 18, 1999.

The Acting Assistant Secretary's memorandum provided that "[t]he Secretaries of the Military Departments shall ensure compliance with this memorandum and take reasonable and necessary steps *to fully implement* the requirements of federal law." Pet. App. G at 172a (emphasis supplied).

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10. Kebodeaux was sentenced for his offense on May 17, 1999. The three-month sentence was approved and ordered to be executed on June 14, 1999. Kebodeaux was discharged from the Air Force on September 18, 1999.

According to an article in a quarterly journal published by the Air Force Judge Advocate General School, it was not until December 17, 1999, that the list of specified UCMJ offenses was added to Department of Defense Instruction 1325.7—which concerns "Administration of Military Correctional Facilities and Clemency and Parole Authority," and includes the procedures concerning sex offender notification—as attachment 27 to that Instruction. *See The Judiciary, Caveat*, THE REPORTER, Dec. 2003, at 16, 17. Because Kebodeaux was discharged from the military on September 18, 1999—prior to the date the requirements of § 115(a)(8)(C) were fully implemented, as required by the Acting Assistant Secretary's memorandum of December 23, 1998—it appears that he was not subject to § 14072(i)(4).

As demonstrated above, whether Kebodeaux was even subject to a federal penalty for failing to register with a state in 1999 is a complicated matter.[11] Had it been important to the Government's argument, that point should have been pressed below. But perhaps it is understandable that the Government did not press this matter. As the Government acknowledged, its arguments about pre-SORNA law would be pertinent only if the Fifth Circuit "were to hold that Congress's authority to require registration by a federal sex offender, qua federal offender, depends on the existence at the time of offense of a federal

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11. The Government's arguments assume that the delegations and procedures used to implement Congress's directive were themselves valid. Kebodeaux does not concede this point.

reporting requirement[.]" Gov't En Banc Br. at 24 n.5. Given *Comstock*'s multi-factor analysis, as well as the Commerce Clause arguments before the court of appeals, there was little chance that the court's decision would depend on the content of pre-SORNA law. And as it turns out, the court's decision did not depend on that point—the court's understanding of pre-SORNA federal sex-offender-registration law was not the linchpin of its constitutional analysis.

b. ***The Spending Clause.*** Another argument raised by the Government would also have to be litigated for the first time in this Court. That is the validity of the Spending Clause as a basis for SORNA's federal-offender provisions, as made applicable to pre-Act offenders by the Attorney General's regulation. Here too, the Government concedes that it "did not specifically invoke the Spending Clause as a source of congressional authority below[.]" Pet. at 24 n.8. The Government's failure to raise this issue—which goes to its second question presented—is another reason the petition for a writ of certiorari should be denied.

3. **Cases pending in other courts of appeals may be better vehicles for considering the questions presented by the Government.** The decision in *Kebodeaux* is "the first from a court of appeals to address" the application of SORNA's federal-offender provisions, as they apply to those convicted before 2006, who were neither in custody nor on some type of conditional release, such as probation or supervised release, when SORNA was

enacted. Pet. at 29. As the Government notes, "no other court of appeals has addressed the constitutional questions that the en banc court debated, let alone considered them in light of this Court's recent decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (NFIB)." Pet. at 23.

At least two other courts of appeals, however, are doing just that, and those cases are likely to be better vehicles to consider the issues involved in *Kebodeaux*—assuming those issues would warrant this Court's review at all.

In *United States v. Brunner*, the Second Circuit is considering the case of a former federal offender, like Kebodeaux, who had completed his sentence and been discharged from the military before SORNA's 2006 enactment. *See* Brief on Appeal for Defendant-Appellant Kenneth Brunner at 4, *United States v. Brunner*, No. 11-2115 (2d Cir. Oct. 11, 2011), ECF No. 14. The *Brunner* court has ordered supplemental briefing to address *NFIB* and *Kebodeaux*. See Orders, *Brunner*, No. 11-2115 (2d Cir. July 9, 2012 & July 11, 2012), ECF Nos. 51, 54. Once *Brunner* is decided, the Second Circuit will have considered issues raised by the Government's questions presented. The decision in *Brunner* will have the added benefit of providing another court of appeals's view of the reasoning in *Kebodeaux*.

In *Elk Shoulder*, the Ninth Circuit has also considered *NFIB* and some of the issues addressed in *Kebodeaux*. 696 F.3d at 928–32. By early next year, the Ninth Circuit should have decided whether that case will be reheard, and so it,

too, ultimately will be a better vehicle than *Kebodeaux* for resolving the second question presented by the Government.

4. There is an independent and adequate basis upon which to affirm *Kebodeaux*, thus pretermiting the questions presented by the Government. In *Reynolds*, this Court ruled that SORNA's requirements do not apply to offenders with pre-SORNA convictions until "the Attorney General validly specifies that the Act's registration provisions apply to them." 132 S. Ct. at 980. The courts of appeals are divided about what date the Attorney General validly specified SORNA's application to pre-SORNA offenders. In the Fifth Circuit, that date is March 30, 2007, so that SORNA applied retroactively to Kebodeaux, whose failure-to-register offense occurred between August 2007 and March 2008. *See United States v. Johnson*, 632 F.3d 912, 930–33 (5th Cir.), *cert. denied*, 132 S. Ct. 135 (2011). In the Sixth and Ninth Circuits, however, Kebodeaux would not have been subject to prosecution under SORNA, as the effective date of the regulation in those jurisdictions is August 1, 2008. *See United States v. Stevenson*, 676 F.3d 557, 562 (6th Cir.), *cert. denied*, 133 S. Ct. 168 (2012); *United States v. Mattix*, 694 F.3d 1082, 1083–85 (9th Cir. 2012).

Should this Court decide that the Sixth and Ninth Circuits have the better view, there will be an adequate and independent basis upon which to affirm the Fifth Circuit's reversal of Kebodeaux's conviction—his failure to register occurred before the Attorney General's regulation made him subject to SORNA.

This issue, like others the Government raises, was not litigated in the Fifth Circuit. Nonetheless, Kebodeaux may defend the Fifth Circuit's judgment on any alternate ground supported by the record. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984) ("prevailing party may urge any ground in support of the judgment" regardless whether it "was relied upon or even considered by the court below"). In fairness, Kebodeaux should be permitted to raise this issue if the Government is permitted to raise issues it failed to litigate, or litigated inadequately, below.

More important, this is yet another reason that Kebodeaux's case presents a poor vehicle to consider the questions presented by the Government. There is an adequate and independent ground upon which to affirm the Fifth Circuit's reversal of his conviction.

III. THE FIFTH CIRCUIT'S DECISION IS CORRECT.

In the Fifth Circuit, the Government defended SORNA's application to pre-Act federal offenders like Kebodeaux on two grounds: (1) SORNA's penalty provision is "within Congress's Necessary and Proper Clause authority to enact laws for the responsible operation of the federal penal system[,]" Gov't En Banc Br. at 13–14; and (2) SORNA is valid legislation under the Commerce Clause "as a means to carry into effect [Congress's] power to regulate the injurious use of interstate travel to evade and defeat" registration requirements, *id.* at 14. The court of appeals correctly applied this Court's precedent in *Comstock* to reject

the first argument. *See* Pet. App. A at 6a–24a. And it correctly applied this Court's Commerce-Clause jurisprudence to reject the second. *Id.* at 24a–41a. In effect, the Government asks this Court to correct the Fifth Circuit's alleged error in applying settled precedent. This Court does not sit to correct the errors of lower courts. *See* SUP. CT. R. 10 (petition rarely granted to correct misapplication of precedent). More important, there is no error to correct in this case.

A. The Fifth Circuit Correctly Applied *Comstock*.

In *Kebodeaux*, the Government "maintain[ed] that its power to criminalize the conduct for which Kebodeaux was originally convicted includes the authority to regulate his movement even after his sentence has expired and he has been unconditionally released." Pet. App. A at 6a. That authority, it argued, was necessary and proper to effectuate its powers under the military clause. Gov't En Banc Br. at 16–18.[12] As the Fifth Circuit correctly found, these arguments were analogous to the issues addressed in *Comstock*. Pet. App. A at 6a (citing *Comstock*, 130 S. Ct. at 1954).

In *Comstock*, the Court decided that the federal Government had the authority to civilly commit inmates currently in federal custody beyond the date they would otherwise be released, if they were sexually dangerous. 130 S. Ct.

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12. In this Court, the Solicitor General has added the Spending Clause as another basis for asserting federal jurisdiction over Kebodeaux. Pet. at 24.

at 1954. The Constitution's Necessary and Proper Clause, together with the enumerated powers that permitted the federal Government to define federal crimes, gave Congress the "power to act as a responsible federal custodian" for prisoners currently in federal custody. *Id.* at 1961. Based on *Comstock*'s five-factor analysis, the Fifth Circuit concluded that SORNA's registration and penalty provisions, as applied to Kebodeaux, exceeded that power. *See* Pet. App. A at 6a–24a.

The Fifth Circuit was correct. *Comstock*'s first factor, the breadth of the Necessary and Proper Clause, cannot sustain SORNA's application to Kebodeaux, who was not in federal custody, not under federal supervision, and not released on the condition that he comply with sex-offender registration requirements. *See id.* at 7a–9a, 23a–24a. As the Government acknowledged in *Comstock*, "the Federal Government would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed." 130 S. Ct. at 1965 (quoting former Solicitor General Kagan, Transcript of Oral Argument at 9 (Jan. 12, 2010)). Once an inmate "has been released from prison and [his] period of supervised release is also completed[,]" a "transfer to State responsibility and State control has occurred, and the Federal Government would have no appropriate role." Transcript of Oral Argument at 9, *Comstock*. At that point "there is a lack of Federal power" over a former federal prisoner. *Id.*

In the Fifth Circuit and before this Court, the Government has sought to cabin its concessions in *Comstock*, arguing that the former Solicitor General's "statement related to 'the power to commit,' and not the lesser regulatory measures" under SORNA. Pet. at 27 n.9 (citation omitted); *see also* Gov't En Banc Br. at 20. But as the transcript of the *Comstock* argument makes clear, those remarks—and this Court's understanding of them—were directed at the federal Government's power to regulate a private citizen's conduct once he completed his federal sentence. They were not limited to the power to commit:

> JUSTICE KENNEDY: Could the Federal Government order a commitment of anyone who's been in Federal custody over the last 10 years?
>
> * * *
>
> GENERAL KAGAN: . . . I would say . . . that the Federal Government would not have the . . . power to commit a person who is—has been released from prison and whose period of supervised release is also completed. At that point the release has been—the transfer to State responsibility and State control has occurred, and the Federal Government would have no appropriate role.
>
> JUSTICE KENNEDY: So that must be because there is a lack of Federal power.
>
> GENERAL KAGAN: Yes, I think that that's correct, that *at that point the State police power over a person has been fully reestablished.*

Transcript of Oral Argument at 9, *Comstock* (emphasis added). Justice Kennedy's question about how far the Necessary and Proper Clause could stretch— *i.e.*, to extend federal control over anyone who had been in federal

custody within the last ten years—presaged Kebodeaux's circumstances. Kebodeaux had been released from custody nearly ten years before the federal Government prosecuted him for failing to register as a sex offender. Correctly applying *Comstock*'s first factor, the Fifth Circuit decided that the Necessary and Proper Clause was not so broad. It did not permit SORNA's application "to those, like Kebodeaux, who had already been unconditionally released from federal custody" when SORNA was enacted. Pet. App. A at 23a.

Comstock's second factor was also correctly analyzed by the court. The civil commitment statute in *Comstock* had a long history—federal laws addressing mental health care for federal prisoners had existed since 1855. 130 S. Ct. at 1958–61. By contrast, "federal law relating to sex-offender registration" has existed "only since 1994." Pet. App. A at 10a. A long-standing history of federal involvement "expands the deference afforded to a statute[,]" while a short history does not. *Id.* Accordingly, the relatively recent history of federal sex-offender-registration laws weighed against SORNA's application to Kebodeaux.

Comstock's third factor addressed whether the challenged law was a reasonable extension of federal authority over certain "persons who are already in federal custody[.]" 130 S. Ct. at 1961–62. The Fifth Circuit found this factor also favored Kebodeaux, who had been "long free from federal custody or supervision." Pet. App. A at 12a. In 1999, Kebodeaux had been "unconditionally released from prison and the military[,]" *id.* at 3a—he was free

from custody, he was not on supervised release or probation, and there were no conditions placed on his release from imprisonment.

The court of appeals rejected the Government's contention that federal sex-offender registration laws were like probation or supervised release because they regulated a prisoner's post-release conduct. *Id.* at 11a–20a. Probation and supervised release are imposed as part of a criminal sentence—sex-offender-registration provisions, as applied to Kebodeaux, were not. *Id.* at 12a–13a. In addition, supervised release and probation are conditions of a prisoner's "release from (or instead of) custody[,]" *id.* at 13a—sex offender registration provisions, as applied to Kebodeaux, were not.[13] Under *Comstock*'s third factor, the federal government's supervisory authority over its prisoners could not be extended to Kebodeaux, who was neither in custody nor released on the condition that he comply with SORNA. To so extend federal authority, the court reasoned, would mean that "Congress would have never-ending jurisdiction to regulate anyone who was ever convicted of a federal crime[.]" *Id.* at 19a–20a.

Comstock's fourth factor, "whether 'the statute properly accounts for state interests[,]'" also favored Kebodeaux. *Id.* at 20a (quoting *Comstock*, 130 S. Ct. at 1962). Although some aspects of SORNA accommodate state interests, its provisions place "a much more substantial imposition on the states' traditional

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13. Currently, federal law "make[s] compliance with SORNA 'an explicit condition' of a sex offender's supervised release[.]" Pet. App. A at 18a (quoting 18 U.S.C. § 3538(d)).

police-power authority" than the statute at issue in *Comstock*. *Id.* at 22a–23a. Under that statute, 18 U.S.C. § 4248, the federal government has to notify the prisoner's home state of his or her federal detention, and release the prisoner to the state if the state wants to assume custody of that prisoner. *Id.* at 21a. No similar accommodation exists under SORNA; it authorizes federal punishment regardless of state interests.

The Fifth Circuit was correct to conclude that SORNA "effect[ed] a 'change in the sensitive relation between federal and state criminal jurisdiction.'" Pet. App. A at 20a (quoting *Lopez*, 514 U.S. at 561 n.3) (additional citation omitted). SORNA's failure to adequately account for state interests interferes with the powers reserved to the states in contravention of basic federalism principles and the Tenth Amendment. "[L]aws that undermine the structure of government established by the Constitution . . . are not '*proper* [means] for carrying into Execution' Congress's enumerated powers." *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.) (brackets in original). "The federal system rests on" the premise "that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). This dual system "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond, id.* SORNA

compromises Kebodeaux's liberty because it purports to control his actions through the exercise of a general police power.

Comstock's final factor considered the links between the federal constitutional power Congress sought to exercise and the statute at issue. *See* Pet. App. A at 23a (considering attenuation between SORNA and Congress's constitutional powers). The purported jurisdictional basis for subjecting Kebodeaux to SORNA, through the Attorney General's regulation, was his commission of a military sex crime in 1999. The Fifth Circuit found this purported jurisdictional basis too attenuated. Congress's power to create federal sex crimes did not confer unending jurisdiction over one who was convicted of such a crime and had fully discharged his sentence. *Id.*

For all these reasons, the Fifth Circuit's decision in *Kebodeaux* was a correct application of this Court's precedent in *Comstock*. It presents no issue that this Court should review though its power to grant certiorari.

B. The Fifth Circuit Correctly Applied This Court's Commerce-Clause Precedent.

The Fifth Circuit correctly rejected the Government's "alternative argument" that SORNA's federal offender provisions, as applied to Kebodeaux, "are necessary and proper to effect Congress's Commerce Clause power." Pet. App. A at 24a–25a. The Government had argued that SORNA was a proper exercise of Congress's power to regulate the use of the channels of interstate

commerce, Gov't En Banc Br. at 29–39, as well its power to regulate activities that substantially affect commerce, "depending on how [that] category is understood." *Id.* at 39–41. The court correctly found that SORNA did not fit any of the "three broad categories of activity that Congress may regulate under its commerce power[,]"[14] including those activities captured through the Necessary and Proper Clause. *See* Pet. App. A at 24a–41a. Before this Court, the Government does not appear to argue otherwise. *See* Pet. at 24–28.

Indeed, the Government appears to have abandoned reliance on this Court's traditional Commerce Clause precedent. *See id.* Instead, it contends that SORNA's national system for registering federal and state sex offenders, and its provisions punishing a failure to register, were within "Congress's Article I authority to enact necessary and proper measures to effectuate its military, commerce, and spending powers." *Id.* at 24. Its main support for this proposition appears to be this Court's statement in *Carr* that "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Id.* at 26 (quoting *Carr*, 130 S. Ct. at 2238). As the Fifth Circuit correctly observed, however, "*Carr* did not address the extent of Congress's

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14. *Lopez*, 514 U.S. at 558.

Article I power at all—it involved a statutory-interpretation issue[.]" *Id.* App. A at 17a.

At bottom, the Government appears to be making an argument that *Comstock*'s view of the federal government's custodial interest over federal offenders extends to those, like Kebodeaux, who have been released from prison and federal supervision. Pet. at 26 (citing *Comstock*, 130 S. Ct. at 1961). This position exceeds the limit the Government recognized in arguing *Comstock*, and far exceeds the limits *Comstock* placed on the federal custodial power. Accordingly, *Comstock* supports the correctness of the Fifth Circuit's decision in *Kebodeaux*; it does not help the Government.

CONCLUSION

FOR THESE REASONS, Kebodeaux respectfully requests that this Court deny the Government's petition for a writ of certiorari.

Respectfully submitted.

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REPLY BRIEF

No. 12-418

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY JAMES KEBODEAUX

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 12-418

UNITED STATES OF AMERICA, PETITIONER

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ANTHONY JAMES KEBODEAUX

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The court of appeals held that 18 U.S.C. 2250(a)(2)(A) is unconstitutional as applied to persons who have been convicted of sex offenses under federal law but who served their sentences and were "unconditionally released" by the federal government before the 2006 enactment of the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 *et seq.* Pet. App. 2a-4a. Since the petition for a writ of certiorari was filed, another court of appeals has unequivocally rejected the Fifth Circuit's constitutional rationale and held that Congress does have power to impose a sex-offender-registration requirement on a federal defendant even after his unconditional release from custody. Respondent presents no valid reason for leaving that disagreement over the powers of Congress unreviewed. Respondent's analysis of the basis of the Fifth Circuit's decision is likewise flawed, and his attempts to argue

against the suitability of this case as a vehicle for review are unsound.

A. The Ninth Circuit Has Now Rejected The Fifth Circuit's Constitutional Restrictions On Congress's Power Over Federal Sex Offenders

1. As an initial matter, respondent errs in suggesting (Br. in Opp. 13-14) that the en banc court of appeals "did not invalidate SORNA as unconstitutional," but, rather, "invalidated only the Attorney General's application of SORNA to specific pre-Act federal offenders." The court of appeals held that SORNA's "registration requirements and [18 U.S.C.] 2250(a)(2)(A)'s criminal penalties for failing to register after intrastate relocation are unconstitutional solely as they apply to federal sex offenders who had been unconditionally released from federal custody before SORNA's passage in 2006." Pet. App. 41a. That declaration of the statute's unconstitutionality is precisely what respondent sought from the court of appeals. See Resp. C.A. Supp. Br. on Reh'g En Banc 9 (summary of argument heading: "[Respondent]'s Conviction Under SORNA Must Be Reversed Because the Statute Was Unconstitutionally Applied to Him.").

Respondent's effort to distinguish between the statute and its implementing regulation lacks merit. It is true that, for persons (like respondent) whose sex-offense convictions preceded SORNA, the Act's registration requirements apply by virtue of the Attorney General's actions. See *Reynolds* v. *United States*, 132 S. Ct. 975, 984 (2012); 28 C.F.R. 72.3 (regulation issued as interim rule in 2007 and finalized in 2010); Pet. 7-8 (citing Department of Justice guidelines issued in 2008). But Congress expressly delegated authority to the Attorney General to specify how the statute would apply to pre-SORNA offenders. See 42 U.S.C. 16913(d). And

Congress anticipated that this authority would be exercised, as there was no "[]realistic possibility" that "the Attorney General would refuse to apply the new requirements to pre-Act offenders." *Reynolds*, 132 S. Ct. at 984. Yet the Fifth Circuit has now struck down this congressionally authorized and expected action and effectively exempted a subset of pre-SORNA sex offenders from the statute's registration requirements and criminal penalty.

The court of appeals' decision plainly strikes at the power of Congress, not the Attorney General. As the court explained: "[O]ur analysis focuses on whether Congress had that authority that it attempted to grant to the Attorney General." Pet. App. 3a n.1; see *id.* at 2a (reversing and rendering a judgment of dismissal because it found "an insufficient basis for Congress to assert" regulatory authority over respondent). Because the court found a want of congressional power, the Attorney General may conform his regulations to the court's ruling (Br. in Opp. 14) only by surrendering an authority Congress conferred on him. Neither the Attorney General nor Congress has any recourse—other than this Court—to make Section 2250(a)(2)(A) applicable within the Fifth Circuit to former federal sex offenders like respondent.

2. Since the filing of the petition, the Ninth Circuit has rejected the Fifth Circuit's analysis and held that Congress had the authority under Article I of the Constitution to authorize the Attorney General to make SORNA applicable to pre-SORNA sex offenders even if they had been unconditionally released. In *United States* v. *Elk Shoulder*, 696 F.3d 922 (9th Cir. 2012), the court held that "Congress has the authority to impose SORNA registration requirements on individuals who

* * * are convicted of federal sex crimes," and it specifically rejected the Fifth Circuit's conclusion in this case that Congress's power could not extend to "federal convicts who have been released from custody before the date of [SORNA's] enactment." *Id.* at 928, 931-932.

Respondent seeks (Br. in Opp. 15-17) to distinguish *Elk Shoulder* because the defendant there was on supervised release when SORNA was enacted. But that distinction has no bearing on the constitutional disagreement.[1] The Ninth Circuit found it was necessary to address the Fifth Circuit's "logic," if not its "specific holding," because, under Ninth Circuit law, "SORNA's registration requirements did not become *applicable* to Elk Shoulder until after his unconditional release from prison in May 2008." *Elk Shoulder*, 696 F.3d at 931 n.10. Thus, *Elk Shoulder* squarely "reject[ed] the Fifth Circuit's conclusion that Congress cannot 'reassert jurisdiction over someone it had long ago unconditionally released from custody,'" and it "disagree[d] with [the Fifth Circuit's] analysis" under the Necessary and Proper Clause. *Id.* at 932 (quoting portion of decision below reprinted at Pet. App. 11a). A district court in the Ninth Circuit has already recognized that *Elk Shoulder* controls—and forecloses reliance on the Fifth Circuit's decision—with respect to the question of Congress's authority to punish a failure to register by a federal sex offender who was released from military custody several years before SORNA was enacted. *United States* v. *Brockbrader*, No. 1:12-cr-156, 2012 WL 5588791, at *1, *4-*5 (D. Idaho Nov. 15, 2012).

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[1] Respondent himself overlooks the supposed distinction when he contends (Br. in Opp. 28-29) that *Elk Shoulder* will "be a better vehicle for resolving" the constitutional question.

As respondent notes (Br. in Opp. 17), the Ninth Circuit has extended the deadline for seeking rehearing in *Elk Shoulder* to January 4, 2013 (because Elk Shoulder's counsel recently withdrew and substitute counsel was appointed).[2] The prospect of rehearing, however, does not diminish the need for this Court's review. If the Ninth Circuit declines to grant rehearing, or if it ultimately reaches the same result as the *Elk Shoulder* panel, the constitutional disagreement will persist. And, even if it ultimately embraces the Fifth Circuit's approach, that would mean that *two* courts of appeals had declared Section 2250(a)(2)(A) unconstitutional—which would still call for certiorari. Pet. 28-29.

3. Respondent seeks to minimize the significance of the decision below by highlighting (Br. in Opp. 9, 10, 15) the government's acknowledgement (Pet. 31) that the decision may have "limited practical effect" because most prosecutions under Section 2250 have involved allegations of interstate travel. But Congress clearly sought in Section 2250(a)(2)(A)—even in the absence of interstate travel—to "assign[] the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders." *Carr* v. *United States*, 130 S. Ct. 2229, 2238 (2010). Thus, as the government also noted (Pet. 29), "the issue will recur." And it has, as evidenced by *Elk Shoulder* and *Brockbrader*; the continuing pendency in the Second Circuit of *United States* v. *Brunner*, No. 11-2115 (argued June 21, 2012); and the recent appeal in *United States* v. *Brune*, No. 12-3322 (10th Cir. docketed Dec. 4,

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[2] See 10-30072 Docket entry Nos. 43-48 (9th Cir. Nov. 5, 7, and 8, 2012).

2012).[3] Under the circumstances, this Court's review is warranted.

B. The Court Of Appeals' Constitutional Analysis Relied On An Erroneous Premise About Respondent's Pre-SORNA Registration Obligations

The petition explains (at 17-24) that the court of appeals' constitutional analysis was based on the erroneous premise that respondent was "unconditionally released" by the federal government in 1999 and not already subject to a federal penalty for failure to register.

1. Respondent suggests (Br. in Opp. 18-21) that "[p]re-SORNA sex offender registration law was not the linchpin" of the court of appeals' constitutional analysis, because it was relevant to only one factor (the second) of its Necessary and Proper Clause analysis under *United States* v. *Comstock*, 130 S. Ct. 1949 (2010). But the point was plainly part of the court's analysis of the third, fourth, and fifth *Comstock* factors as well. The court found that SORNA's extension of previous laws is not "reasonabl[e]" because it "appl[ies] sex-offender-registration requirements to someone long free from federal custody or supervision," Pet. App. 11a-12a; see *id.* at 18a, 20a; that States' interests are not adequately accommodated because Section 2250(a)(2)(A) applies to "individuals with whom the federal government had previously severed all ties," *id.* at 23a; and that SORNA is too sweeping because it "opens the door" "to congressional power over anyone who was ever convicted of a

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[3] The defendant in *Brune* contends that the federal government cannot constitutionally "require [him] to register" under SORNA "until he leaves the state of Kansas" because he "is no longer under [federal] supervision or custody" for his "2001 federal crime of possession of child pornography." 2:11-cr-20128 Doc. 39, at 8 (D. Kan. July 2, 2012).

federal crime of any sort," *ibid.* In short, the court of appeals' analysis was "based almost exclusively" on the conclusion that respondent was "'long ago unconditionally released from custody.'" *Elk Shoulder*, 696 F.3d at 932.[4] And the unconditional-release premise was part of the court's repeated articulations of its constitutional holding. Pet. App. 2a, 4a, 41a. If that limitation was immaterial to the court's analysis, as respondent suggests (Br. in Opp. 20), it presumably would have said that, rather than respond to Judge Haynes's dissent by stating (incorrectly) that "before the passage of SORNA, [respondent] was subject only to state, not federal, registration obligations." Pet. App. 5a n.4.

2. Respondent further contends (Br. in Opp. 19-21, 22-27) that he was not subject to any federal-law registration requirement when he was released from federal custody in 1999. Yet, as the petition explains (at 18-20), federal law at that time required him to register as a sex offender and imposed federal criminal penalties for any knowing failure to do so.

a. Respondent suggests (Br. in Opp. 22) that the pre-SORNA criminal provisions that the government invokes, 42 U.S.C. 14072(i)(3) and (i)(4) (repealed 2009), were not "federal *registration* requirement[s]" because

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[4] Respondent believes (Br. in Opp. 19) that the court of appeals' references to "unconditional release" were intended as a shorthand for being out of custody and not required to register as an actual condition of release. But that reading is inconsistent with the broader phrases quoted in the text above. It is also irreconcilable with the court's response to Judge Haynes. Pet. App. 4a n.4. Judge Haynes concluded that *federal* law required respondent to register with *state* authorities. *Id.* at 65a-73a. The court replied that the problem was that respondent was not required to register directly by federal law at all. *Id.* at 4a n.4. It did not rely on the absence of a supervised-release condition.

they merely "prescribed federal penalties for an offender who failed to register as required by state law." But for Congress to impose federal criminal penalties for a sex offender's failure to register, it had to assert Article I power over federal sex offenders. That means that the later enactment of SORNA did not require Congress to "*reassert* jurisdiction over [their] intrastate activities," as the court of appeals believed. Pet. App. 2a (emphasis added).

b. With respect to Section 14072(i)(3), respondent contends (Br. in Opp. 23-24) that it "did not apply to persons, like [respondent], who were in military custody," because it referred to part of a provision, 18 U.S.C. 4042, addressing persons in BOP custody. Respondent, however, misapprehends the significance of Section 14072(i)(3)'s specific cross-reference to 18 U.S.C. 4042(c)(4). While it is true, as respondent notes, that Section 4042's substantive directions to BOP personnel were inapplicable to respondent while he was in military custody (see 18 U.S.C. 4042(d)), that did not prevent him from being a "person described in [S]ection 4042(c)(4)," which is all that Section 14072(i)(3) required.

c. With respect to Section 14072(i)(4), respondent concludes (Br. in Opp. 26) that "[i]t appears that he was not subject to § 14072(i)(4)." But that provision applied to "[a] person who is * * * sentenced by a court martial for conduct in a category specified by the Secretary of Defense." 42 U.S.C. 14072(i)(4) (repealed 2009); see Pet. App. 42a-44a & n.1 (Owens, J., concurring). The relevant specification, which included the offense for which respondent was convicted, was made in a December 1998 "directive-type memorandum" that was "effective immediately." Pet. App. 172a, 174a; see Pet. 20.

Respondent asserts (Br. in Opp. 25-26) that, when he was released from military custody in September 1999, the Department of Defense had not yet fully implemented the 1998 memorandum designating the covered military offenses and had not formalized its "procedures concerning sex offender notification." He also suggests that he was not informed by the military of his registration obligations. Whether or not that is so, it does not alter the reality that Section 14072(i)(4) did require him to register as a sex offender in any State where he resided, worked, or studied.

3. As the petition explains (at 22-24), this Court should, consistent with principles of constitutional avoidance, correct the court of appeals' mistaken conclusion that respondent was not subjected to continuing federal jurisdiction—in the form of a federal-law punishment for failing to register as a sex offender—when he was released from military custody in 1999. Although respondent contends that the first question presented was "inadequately litigated below" (Br. in Opp. 21), it was the basis for the dissenting opinion on behalf of five judges, see Pet. App. 61a-73a, and it was clearly pressed and passed upon, *United States* v. *Williams*, 504 U.S. 36, 41 (1992). See Pet. 18 n.6. An en banc court's invalidation of a federal statute should not be permitted to stand based on such a flawed foundation.

C. The Court Of Appeals Erred In Holding That Congress Lacks Article I Authority To Punish A Former Federal Sex Offender's Failure To Register Under SORNA

Even assuming that federal law did not continuously require respondent to register as a sex offender after his 1999 release, the court of appeals still erred in concluding that Congress lacks authority to criminalize respondent's failure to update his registration following an

intrastate change of residence. The petition explains (at 24-28) that Section 2250(a)(2)(A), as applied to a person convicted of a federal sex offense and unconditionally released from federal custody and supervision before SORNA's enactment, is a proper exercise of Congress's Article I authority to enact necessary and proper measures to effectuate its military, commerce, and spending powers. See also Pet. App. 46a-61a (Dennis, J., dissenting).

With respect to the Necessary and Proper Clause, respondent defends (Br. in Opp. 31-37) the court of appeals' consideration of the factors identified in this Court's decision in *Comstock*. But the Ninth Circuit's contrary analysis in *Elk Shoulder* is more persuasive. See 696 F.3d at 929-932. In particular, respondent mischaracterizes (Br. in Opp. 35-36) SORNA's supposed insensitivity to States' interests. SORNA respects those interests by requiring registration under *States'* registration schemes. See 42 U.S.C. 16913(a). And Section 2250 provides an affirmative defense when a State does not permit registration. See 18 U.S.C. 2250(b). Section 2250(a)(2)(A) cannot be viewed as asserting a "general police power." Br. in Opp. 37. Unlike civil commitment, it leaves a sex offender in the community and reinforces the State's own registration system. Cf. *id.* at 33 (discussing oral argument of then-Solicitor General Kagan in *Comstock*). It therefore responsibly carries out the federal government's "special role in ensuring compliance with SORNA's registration requirements by federal sex offenders," who "typically would have spent time under federal criminal supervision." *Carr*, 130 S. Ct. at 2238.

D. The Court Should Not Entertain Respondent's Proposed Alternative Ground For Affirmance

As the petition acknowledges (at 8 n.4), the courts of appeals have adopted different dates on which SORNA's registration requirements became applicable to pre-enactment sex offenders, ranging from February 28, 2007, to August 1, 2008. Because respondent's failure to register occurred between August 2007 and March 2008, he suggests (Br. in Opp. 29-30) that this Court could affirm the court of appeals' judgment in this case on the alternative ground that the proper date of applicability was August 1, 2008. "But this Court will affirm on grounds that have not been raised below . . . only in exceptional cases." *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273 (2009) (internal quotation marks and citation omitted). Respondent failed to raise this issue in the court of appeals, even though the en banc court would not have been bound by circuit precedent. See Pet. 8 n.4.

The question of precisely when, during an 18-month period, SORNA's requirements became applicable to pre-SORNA offenders is one of rapidly diminishing importance that is not worthy of this Court's review.[5] Unlike the decision below, even the circuits that have adopted the conclusion least favorable to the government on the timing question have not categorically exempted a class of former federal sex offenders from Section 2250(a)(2)(A); they have merely shifted the date after which a failure to register would become punishable under SORNA. See, *e.g.*, *Elk Shoulder*, 696 F.3d at 931

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[5] The Court most recently denied certiorari on the question on October 1, 2012. See *Stevenson* v. *United States*, 133 S. Ct. 168 (No. 11-10520); *Rogers* v. *United States*, 133 S. Ct. 157 (No. 11-10450).

n.10. Respondent would have been punishable in every other circuit if his failure to register had persisted for five months beyond the charged dates. But if this Court were to affirm on respondent's proposed alternative ground without also rejecting the Fifth Circuit's statutory or constitutional analysis, the en banc court's reasoning would continue to prevent respondent (and other former federal sex offenders) from being prosecuted under Section 2250 at any point before they provably traveled in interstate commerce.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2012

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 12-418

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY JAMES KEBODEAUX

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

A person who is required to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA) as a result of a conviction under federal law and who knowingly fails to register or update a registration as required by federal law is subject to criminal penalties under 18 U.S.C. 2250(a)(2)(A). Before SORNA was enacted, respondent was convicted of a military sex offense, completed service of his sentence, and was subject to a federal obligation to register as a sex offender under pre-SORNA law. The court of appeals held in this case that SORNA is unconstitutional as applied to respondent on the ground that the statute exceeded Congress's powers under Article I of the Constitution. The questions presented are as follows:

1. Whether the court of appeals erred in conducting its constitutional analysis on the premise that respondent was not under a federal registration obligation until SORNA was enacted, when pre-SORNA federal law obligated him to register as a sex offender.

2. Whether the court of appeals erred in holding that Congress lacks the Article I authority to provide for criminal penalties under 18 U.S.C. 2250(a)(2)(A), as applied to a person who was convicted of a sex offense under federal law and completed his criminal sentence before SORNA was enacted.

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In the Supreme Court of the United States

No. 12-418

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY JAMES KEBODEAUX

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-73a) is reported at 687 F.3d 232. The opinion of the panel of the court of appeals (Pet. App. 75a-113a) is reported at 647 F.3d 137, and an earlier panel opinion is reported at 634 F.3d 293. The opinion of the district court (Pet. App. 114a-132a) denying respondent's motion to dismiss is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2012. The petition for a writ of certiorari was filed on October 4, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the Constitution provides in relevant parts as follows:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *
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> * * *
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> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
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> * * *
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> To make Rules for the Government and Regulation of the land and naval Forces.
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> * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.

U.S. Const. Art. I, § 8, Cls. 1, 3, 14 and 18.

Relevant statutory provisions are reprinted in the appendices to this brief (App., *infra*, 1a-15a) and to the petition for a writ of certiorari (Pet. App. 177a-228a).

STATEMENT

Following a bench trial, respondent was convicted of failing to register or update his registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to one year and a day of imprisonment, to be followed by five years of supervised release. The court of appeals reversed, finding 18 U.S.C.

2250(a)(2)(A) unconstitutional as applied to respondent. Pet. App. 1a-73a, 78a.

1. a. "Sex offenders are a serious threat in this Nation," in large part because "the victims of sexual assault are most often juveniles" and because "convicted sex offenders * * * are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune* v. *Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion); see *Smith* v. *Doe*, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). Consequently, Congress has frequently enacted legislation to encourage and assist States in tracking sex offenders' addresses and making information about sex offenders available to the public "for its own safety." *Id.* at 99.

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (42 U.S.C. 14071). The Wetterling Act encouraged States, as a condition of receiving federal funding, to adopt sex-offender-registration laws meeting certain minimum standards. See *Smith*, 538 U.S. at 89-90. By 1996, every State and the District of Columbia had enacted a sex-offender-registration law. *Id.* at 90.

In 1996, Congress bolstered the minimum federal standards by adding a mandatory community notification provision to the Wetterling Act. See Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (42 U.S.C. 14071(e)). Congress also strengthened the national effort to ensure the registration of sex offenders by directing the FBI to create a national sex-offender database, requiring lifetime registration for certain offend-

ers, and making the failure of certain persons to register a federal crime, subject to a penalty of imprisonment of up to one year (for a first offense) or ten years (for a second or subsequent offense). See Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. 14072).

In 1997, Congress expanded that federal criminal penalty for failure to register to include persons who had been convicted of federal sex offenses (including those sentenced by courts-martial). Department of Justice Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, Tit. I, § 115(a)(2)(F) and (6)(C), 111 Stat. 2463-2464 (42 U.S.C. 14071(b)(7), 14072(i) (Supp. III 1997)). As further amended in 1998, the federal criminal penalty applied to any individual convicted of specified federal or military sex offenses who "knowingly fail[ed] to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation." Department of Justice Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(b) [Tit. I, § 123(3)], 112 Stat. 2681-73 (42 U.S.C. 14072(i)(3) and (4)). Later statutes continued to enhance federal registration and notification requirements.[1]

b. Despite those legislative efforts, Congress grew concerned about "loopholes and deficiencies" in the existing registration and notification statutes, which re-

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[1] See PROTECT Act, Pub. L. No. 108-21, §§ 604-605, 117 Stat. 688 (requiring, *inter alia*, States to make sex-offender-registry information available on the Internet); Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (requiring sex offenders to provide notice concerning institutions of higher education at which they work or are students).

sulted in an estimated 100,000 sex offenders becoming "missing" or "lost." H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20, 26 (2005) (*House Report*). On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. 16901 *et seq.*). SORNA was intended to make "more uniform and effective" the "patchwork" of federal and state sex-offender registration systems that were already in effect. *Reynolds* v. *United States*, 132 S. Ct. 975, 978 (2012). As *Reynolds* explained, SORNA "repeal[ed] several earlier federal laws that also (but less effectively) sought uniformity; [set] forth comprehensive registration-system standards; [made certain] federal funding contingent on States' bringing their systems into compliance with those standards; [and required] both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current)." *Ibid.* SORNA also "creat[ed] federal criminal sanctions applicable to those who violate the Act's registration requirements." *Ibid.*

SORNA requires that every "sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a). A "sex offender," in turn, is defined as "an individual who was convicted of" an offense that falls within the statute's defined offenses. 42 U.S.C. 16911(1) and (5)-(7). SORNA specifies, among other things, the kinds of information that must be collected as part of registration (42 U.S.C. 16914), the length of time that offenders must remain registered (42 U.S.C. 16915 (2006 & Supp. V 2011)), and the frequency with which a sex offender must appear and verify registry

information (42 U.S.C. 16916). SORNA requires States to adopt the specified federal standards or risk losing certain federal funds. 42 U.S.C. 16912, 16925.[2]

To enforce SORNA's registration requirements, Congress made noncompliance a federal crime in certain circumstances. As relevant here, SORNA makes it a federal crime when someone who is required to register as a sex offender knowingly fails to register (or to update a registration) and that person either

> (2)(A) is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country.

18 U.S.C. 2250(a). In *Carr* v. *United States*, 130 S. Ct. 2229 (2010), this Court held that the interstate travel referred to in Subparagraph (B) must occur after SORNA became effective, but the Court also observed, with respect to Subparagraph (A), that "it is entirely

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[2] The vast majority of States have complied with SORNA or are working toward compliance. Sixteen States have substantially implemented SORNA's requirements. See Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, U.S. Dep't of Justice (SMART Office), *Jurisdictions that Have Substantially Implemented SORNA*, http://smart.gov/newsroom_jurisdictions_sorna.htm (last visited Feb. 24, 2013). Consistent with 42 U.S.C. 16925(c), one of those States (Pennsylvania) and 29 other States received federal approval for fiscal year 2012 "for reallocation of the funding penalty to work solely towards furthering SORNA implementation activities and efforts." SMART Office, *Newsroom*, http://smart.gov/newsroom.htm (last visited Feb. 24, 2013).

reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Id.* at 2238.

Sex offenders convicted before SORNA's July 2006 enactment were not required to register under SORNA until the Attorney General exercised his delegated authority under 42 U.S.C. 16913(d) to "validly specif[y] that the Act's registration provisions apply to them." *Reynolds*, 132 S. Ct. at 980. On February 28, 2007, the Attorney General issued an interim rule specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to [SORNA's] enactment." 72 Fed. Reg. 8897 (codified at 28 C.F.R. 72.3). On July 2, 2008, the Attorney General promulgated final guidelines for the States and other jurisdictions on matters of SORNA's implementation. See 73 Fed. Reg. 38,030. Those guidelines were issued after public notice and comment and reaffirmed SORNA's applicability to all sex offenders. *Id.* at 38,035-38,036, 38,046, 38,063. On December 29, 2010, the *Federal Register* published an Attorney General order finalizing the interim rule, with one clarifying change in an example to avoid any possible inconsistency with the decision in *Carr*. See 75 Fed. Reg. 81,849.[3]

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[3] The courts of appeals have adopted different dates, ranging from February 28, 2007, to August 1, 2008, on which SORNA's registration requirements became applicable to pre-enactment sex offenders. See Pet. 8 n.4 (citing cases). Under Fifth Circuit law, respondent was required to register under SORNA at the time of his offense (between August 2007 and March 2008). Although respondent challenged the interim rule in the district court, *id.* at 118a, he did not

2. In June 1999, respondent, who was then in the United States Air Force, was convicted by a special court-martial for committing, on multiple occasions in March 1999, the offense of carnal knowledge of a female under the age of 16, in violation of Article 120(b) of the Uniform Code of Military Justice, 10 U.S.C. 920(b). Pet. App. 116a, 167a; D. Ct. Doc. 49, at 3 (filed Aug. 26, 2008). He received a sentence of confinement for three months and a bad-conduct discharge. Pet. App. 116a.

Sometime after the September 1999 completion of his sentence, respondent moved to San Antonio, Texas, and later to El Paso, Texas. Pet. App. 167a. In early August 2007, he reported to El Paso authorities and updated his sex-offender registration. *Id.* at 167a-168a; D. Ct. Doc. 49, at 9. Later that month, however, he moved back to San Antonio and failed to update his registration. Pet. App. 169a. In March 2008, he was located in San Antonio and arrested. *Ibid.*

3. In April 2008, a federal grand jury indicted respondent on one count of knowingly failing to register and update a registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a)(2) and (3). Pet. App. 115a. Respondent moved to dismiss the indictment, contending, *inter alia*, that Section 2250 exceeds Congress's au-

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argue on appeal that that prevented SORNA's registration requirements from applying to him—not even before the en banc court, which would not have been bound by circuit precedent. See *id.* at 2a n.1 (citing *United States* v. *Johnson*, 632 F.3d 912, 930-933 (5th Cir.), cert. denied, 132 S. Ct. 135 (2011), which found no prejudice in applying SORNA to a pre-enactment sex offender after March 30, 2007)). As the government explained at the petition stage (U.S. Reply Br. 11-12), respondent's claim (Br. in Opp. 29-30) that the Court may affirm the judgment on the basis that SORNA did not apply to him overlooks his failure to preserve the issue and that it is not an issue of importance otherwise worthy of review.

thority under the Commerce Clause. *Id.* at 118a. The district court denied the motion to dismiss, *id.* at 114a-132a, and respondent was convicted following a bench trial on stipulated facts, *id.* at 78a. The district court sentenced respondent to imprisonment for one year and one day, to be followed by five years of supervised release. *Ibid.*[4]

4. On respondent's appeal, a panel of the court of appeals affirmed his conviction, Pet. App. 75a-113a, but the court granted rehearing en banc and reversed, *id.* at 1a-73a, 74a. Over the dissent of six judges, the court held that Section 2250(a)(2)(A) is unconstitutional as applied to persons who had been convicted of sex offenses under federal law, but who had served their sentences and been "unconditionally released" by the federal government before SORNA was enacted in 2006. *Id.* at 2a, 4a.

a. The majority focused on what it called "former federal sex offenders," by which it meant persons who were convicted of sex offenses under federal law but who had been "unconditionally released from [the federal government's] jurisdiction before SORNA's passage in 2006." Pet. App. 3a, 4a, 41a. With respect to respondent, the court concluded that, by the time SORNA was enacted, he had "fully served" the sentence associated with his sex offense, and "[h]e was no longer in federal custody, in the military, under any sort of supervised release or parole, or in any other special relationship with the federal government." *Id.* at 2a. In ex-

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[4] Respondent's supervised release began in January 2009, but the district court later revoked that release and sentenced him to an additional 17 months of imprisonment for violating his conditions of release. Order at 1, 3, *United States* v. *Kebodeaux*, No. 5:10-cr-117 (W.D. Tex. Sept. 30, 2010). Respondent completed that term in June 2011.

plaining what it meant by "unconditional release," the court rejected the contention—advanced by both the government (Gov't C.A. En Banc Br. 23-24 & nn.4-5) and a dissenting opinion (Pet. App. 65a-73a)—that respondent had in fact been subject to a federal requirement to register as a sex offender "ever since his 1999 conviction," *id.* at 4a n.4. The court concluded that, under pre-SORNA federal law, the only sex offenders who were "subject to federal registration for intrastate changes in residence" were those who were required to register directly with the FBI because they lived in States where sex-offender registries were not compliant with federal guidelines. *Ibid.* (citing 42 U.S.C. 14072(g)(1)-(3) and (i) (repealed by SORNA)). The court found that respondent's "state of residence, Texas, was compliant with federal guidelines at the time of his offense" and he was therefore "subject only to state, not federal, registration obligations" under pre-SORNA law. *Id.* at 5a n.4.

b. Based on its premise that respondent had been "*unconditionally* let * * * free" by the federal government years before SORNA was enacted, the court of appeals concluded that Congress lacked a "jurisdictional basis" to regulate his subsequent conduct because "he once committed a [federal] crime." Pet. App. 4a.

The court of appeals first considered the Necessary and Proper Clause. It rejected the government's argument that "its power to criminalize the conduct for which [respondent] was originally convicted includes the authority to regulate his movement even after his sentence has expired and he has been unconditionally released." Pet. App. 6a. The court discussed the five considerations that informed this Court's analysis in *United States* v. *Comstock*, 130 S. Ct. 1949 (2010), in sustaining Congress's power to provide for the civil commitment of

sexually dangerous federal prisoners beyond the time when they would otherwise have been released from custody. The court of appeals found that most of those considerations support respondent. Pet. App. 7a-24a. In its view, SORNA's

> regulation of an individual, after he has served his sentence and is no longer subject to federal custody or supervision, solely because he once committed a federal crime, (1) is novel and unprecedented despite over 200 years of federal criminal law, (2) is not 'reasonably adapted' to the government's custodial interest in its prisoners or its interest in punishing federal criminals, (3) is unprotective of states' sovereign interest over what intrastate conduct to criminalize within their own borders, and (4) is sweeping in the scope of its reasoning.

Id. at 24a.

The court of appeals rejected the government's "alternative argument" that SORNA's registration requirements for federal sex offenders are "necessary and proper to effect Congress's Commerce Clause power." Pet. App. 24a-25a. It concluded that, as applied to federal sex offenders who had not engaged in interstate travel, SORNA is not a permissible regulation of the use of, or things or persons in, the channels of interstate commerce or of conduct that has substantial effects on interstate commerce. *Id.* at 26a-38a.

The court of appeals emphasized that its "finding of unconstitutionality * * * does not affect the registration requirements for (1) any federal sex offender who was in prison or on supervised release when the statute was enacted in 2006 or (2) any federal sex offender convicted since then." Pet. App. 4a; *id.* at 41a-42a ("Every federal sex offender subject to federal custody or super-

vision when SORNA was enacted, or who was convicted since then, is unaffected."). The court also noted that its reasoning would not preclude prosecution of a federal sex offender when "[s]ome other jurisdictional ground, such as interstate travel," is present. *Id.* at 4a.

c. Judge Owen concurred in the judgment. Pet. App. 42a-46a. She rejected the majority's understanding of the federal criminal penalties in place when respondent was released from custody, concluding instead that respondent "could have been prosecuted under [pre-SORNA] *federal* law * * * for knowingly failing to register in any State in which he resides," "if he moved from El Paso, Texas to San Antonio, Texas and failed to notify Texas authorities of this intrastate change in residence in the manner required by state law." *Id.* at 42a-43a, 44a. In Judge Owen's view, "Congress was well within its powers under the Necessary and Proper Clause to impose conditions such as intrastate registration and reporting requirements on federal sex offenders in connection with their convictions and sentencing." *Id.* at 44a. She found, however, that SORNA had altered "the reporting requirements imposed at the time [respondent] was sentenced" and "increased the punishment for failure to comply with reporting requirements," which meant, in her view, that "Congress could not constitutionally apply SORNA to [respondent's] intrastate relocations under either the Necessary and Proper Clause or the Commerce Clause." *Id.* at 46a.

d. Judge Haynes dissented, joined by Judges King, Davis, Stewart, and Southwick. Pet. App. 61a-73a. She concluded that Section 2250(a)(2)(A) is constitutional facially and as applied to respondent. *Ibid.* Even assuming that the majority had correctly concluded that Congress would be unable to impose a registration require-

ment on a federal sex offender after he has been unconditionally released, she determined that Congress had not done that here, because respondent "was, in fact, continuously subject to federal registration authority from the time of his release through SORNA's inception (and thereafter)." *Id.* at 66a. Under pre-SORNA federal law, respondent was required to register as a sex offender for at least ten years, regardless of which State he chose to reside in after his release from federal custody. *Id.* at 69a. Although SORNA "revamped prior federal registration requirements," Judge Haynes concluded that it would "make[] little sense to contend that Congress lost its power or 'jurisdictional hook' over [respondent] simply because it updated the national sex-offender registration system laws." *Id.* at 71a, 72a. She saw "no reason to distinguish the jurisdiction (as a matter of federal power) exercised over [respondent] under SORNA from that exercised under its predecessor sex offender registry laws that applied to [respondent]." *Id.* at 73a. Accordingly, she concluded that, on the basis of the majority's assumption "that [respondent's] conviction would be constitutional had SORNA been enacted while he was in prison or on supervised release, then his conviction is constitutional given the continuous federal jurisdiction Congress exercised over [respondent] from the time he committed his original sex crime * * * to the present day." *Ibid.*

e. Judge Dennis also dissented, joined by Judge King, concluding that Section 2250(a)(2)(A) is valid as a necessary and proper means of implementing the registration requirement imposed by 42 U.S.C. 16913, which is itself supported by Congress's powers under the Spending and Commerce Clauses. Pet. App. 46a-61a. Judge Dennis criticized the majority for analyzing only

Congress's Commerce Clause and Necessary and Proper Clause powers, when Congress "plainly used three, not just two, of its constitutional powers." *Id.* at 50a. He concluded that SORNA's registration provisions "are manifestly rationally adapted to carry Congress's spending power into execution for the legitimate purpose of establishing a comprehensive national system" for sex-offender registration and notification. *Id.* at 54a. He also concluded that "Section 2250(a)(2)(A) is necessary and proper to bring about parity and a consistent level of enforcement, monitoring and tracking of all sex offenders, so that laxity toward federal sex offenders does not disrupt or interfere with Congress's enumerated powers sought to be executed through SORNA," and that Section 2250(a)(2)(B), which requires interstate travel, is a legitimate exercise of Congress's Commerce Clause authority. *Id.* at 55a, 56a.

SUMMARY OF ARGUMENT

Congress has constitutional authority to subject a federal sex offender to criminal penalties for failing to register or update a sex-offender registration, whether or not that penalty is enacted before the end of the offender's federal criminal sentence. Accordingly, 18 U.S.C. 2250(a)(2)(A) is valid as applied to respondent.

I. The court of appeals believed that Congress could not "constitutionally reassert jurisdiction over [respondent's] intrastate activities after his unconditional release from federal custody." Pet. App. 2a. That analysis was predicated on a mistake about respondent's status under pre-SORNA federal law.

A. When respondent was released from military custody in 1999, his offense of conviction already triggered a potential federal criminal penalty for failure to register as a sex offender under two provisions of the Wetter-

ling Act that were in effect between 1998 and 2009: 42 U.S.C. 14072(i)(3) and (4). Although the Wetterling Act assumed respondent would register with Texas's registry, it still constituted a *federal*-law registration requirement, because it provided a federal sanction for failure to register. As a result, SORNA did not need to initiate a new period of federal jurisdiction over respondent, because Congress had continuously asserted authority over him.

B. The court of appeals' constitutional analysis was fundamentally predicated on its threshold error about federal jurisdiction over respondent in 1999. The Court could correct that error and remand the case to permit the court of appeals to revisit its analysis. In the alternative, the Court may reverse the judgment outright, in light of the court of appeals' correct recognition that Congress had the constitutional authority to assert jurisdiction over respondent in the form of sex-offender-registration obligations while he was still in federal custody (or under some form of federal supervision).

II. Even assuming that respondent was not previously subject to a federal penalty for failing to register, Section 2250(a)(2)(A) is constitutional as applied to him.

A. Like the federal civil-commitment provision that this Court upheld in *United States* v. *Comstock*, 130 S. Ct. 1949 (2010), Section 2250(a)(2)(A) is a necessary and proper measure to effectuate the enumerated powers that support the federal statutes under which federal sex offenders are convicted. Sex-offender registration is a "legitimate" collateral consequence of conviction that is intended to protect the community. *Smith* v. *Doe*, 538 U.S. 84, 102-104 (2003). Section 2250(a)(2)(A) is reasonably adapted because the obligations it enforces relate directly to the sexual nature of the underlying

federal offense. It affects only the narrow class of individuals whose previous criminal conduct has brought them within federal regulation. Indeed, this Court has already recognized that it was "entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders." *Carr* v. *United States*, 130 S. Ct. 2229, 2238 (2010). The power at issue here is inherently narrower than civil commitment, both in its effect on the individual and in any incursion on States' interests. It is thus both necessary and proper in the relevant senses.

B. The constitutionality of Section 2250(a)(2)(A) is supported by the "five considerations" that the Court articulated in *Comstock*. 130 S. Ct. at 1956. In particular, it builds upon the federal government's history of using post-release parole, probation, or supervision to protect the public from the risks presented by federal offenders. It reasonably extends authority over a limited category of persons who brought themselves within federal power by committing federal sex offenses. It accommodates state interests, because Section 2250 relies on States' cooperation in registering offenders and because SORNA imposes only a modest financial penalty on States that do not substantially comply with its requirements. By applying only to federal sex offenders, for whom the federal government has a "special role," *Carr*, 130 S. Ct. at 2238, Section 2250's link to the powers underlying their offenses is not too attenuated, and the provision is not too sweeping.

C. Section 2250(a)(2)(A) is also valid under the Necessary and Proper Clause when it is considered within the broader context of SORNA, because it is a focused and rational component of Congress's comprehensive

program to address the risks associated with a mobile sex-offender population. SORNA draws upon, *inter alia*, Congress's spending and commerce powers and its powers to legislate with respect to members of the Armed Forces, the District of Columbia, federal territories, and Indian tribes. Congress reasonably concluded that stronger federal penalties were necessary to support its revised registration requirements and were an appropriate means of ensuring that the federal funds invested in creating a national sex-offender-registration system were well spent. Congress's willingness to shoulder some of the burden of implementing SORNA with respect to sex offenders who had violated federal law was reasonable and does not expand federal power at the expense of traditional state prerogatives.

ARGUMENT

CONGRESS HAS CONSTITUTIONAL POWER TO SUBJECT A FORMER FEDERAL SEX OFFENDER TO CRIMINAL PENALTIES FOR FAILING TO REGISTER OR UPDATE A SEX-OFFENDER REGISTRATION

The court of appeals held that 18 U.S.C. 2250(a)(2)(A) is unconstitutional as applied to respondent because it believed that Congress could not "constitutionally reassert jurisdiction over [respondent's] intrastate activities after his unconditional release from federal custody." Pet. App. 2a. A reassertion of jurisdiction, however, was not necessary: when he completed his federal sentence in 1999, respondent was already subject to a pre-SORNA federal criminal penalty for future failures to register as a sex offender. But even assuming that respondent had not been under any federal obligation when he was released from custody, the application of Section 2250(a)(2)(A) is constitutionally valid under the Necessary and Proper Clause. First, a federal sex-

offender-registration obligation is a reasonably adapted means of achieving legitimate ends under the enumerated powers that justified the creation of the underlying federal sex-offense statutes. Second, Section 2250(a)(2)(A) is a narrow and rational component of Congress's larger effort in SORNA—on the basis of multiple enumerated powers—to create a comprehensive national system for sex-offender registration.

I. SORNA DID NOT "REASSERT" FEDERAL JURISDICTION OVER RESPONDENT, BECAUSE HE WAS ALREADY SUBJECT TO A FEDERAL CRIMINAL PENALTY FOR FAILURE TO REGISTER WHEN HE COMPLETED HIS FEDERAL SENTENCE

This Court has recognized that "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Carr* v. *United States*, 130 S. Ct. 2229, 2238 (2010). Consistent with that recognition, the court of appeals did not question "Congress's ability to impose conditions on a [federal] prisoner's release from custody, including requirements that sex offenders register intrastate changes of address after release." Pet. App. 3a-4a. Congress's exercise of such a power regulates a person who has violated federal law and is thus an appropriate subject of federal regulations that address the collateral consequences of the violation.[5]

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[5] As this Court made clear in *Smith* v. *Doe*, 538 U.S. 84 (2003), sex-offender-registration-and-notification requirements are valid civil regulatory measures and raise no ex-post-facto concerns. *Id.* at 105-106 (holding that retroactive application of Alaska's sex-offender-

The court of appeals never disputed that Congress has constitutional authority to impose sex-offender-registration obligations on federal offenders so long as the government *continuously* asserts jurisdiction over such offenders. Pet. App. 3a-4a & n.4, 41a-42a. But it concluded that Congress could not "reassert jurisdiction" over persons who had previously been "unconditionally released from [federal] custody." *Id.* at 11a; see *id.* at 2a ("agree[ing]" with respondent's contention that Congress "cannot constitutionally reassert jurisdiction over his intrastate activities after his unconditional release from federal custody"). In fact, from the time he was released from military custody in 1999, respondent was continuously subject to a federal criminal penalty for knowingly failing to register as a sex offender. That alone is a basis for reversal of the decision below.[6]

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registration-and-notification law was not a violation of the Ex Post Facto Clause applicable to States). Thus, the fact that SORNA adds to the consequences of respondent's federal conviction is not constitutionally problematic. Cf. *Chaidez* v. *United States*, No. 11-820 (Feb. 20, 2013), slip op. 6 n.5 (noting that "sex offender registration" is "commonly viewed as [a] collateral" consequence of conviction).

[6] Whether respondent was already subject to registration requirements enforceable under federal law in 1999 was both pressed and passed upon below. Before the en banc court, the government explained that "a federal criminal penalty for failure to register * * * has expressly applied to federal and military sex offenders since" the 1998 Appropriations Act and that "[respondent's] military sex offense has triggered a federal sex-offender-registration requirement" ever since he committed his crime in March 1999. Gov't C.A. En Banc Br. 23, 24 n.5. Accordingly, the government contended that even if the court of appeals "were to hold that Congress's authority to require registration by a federal sex offender, qua federal offender, depends on the existence at the time of offense of a federal reporting requirement, [respondent's] conviction would still stand." *Id.* at 24 n.5. The court squarely passed upon the threshold question, concluding that

A. In 1999, Respondent Was Already Subject To A Federal Criminal Penalty For Future Failures To Register As A Sex Offender

At the time of respondent's March 1999 offense conduct, his June 1999 conviction, and his September 1999 release from military custody, his offense of conviction triggered a potential federal criminal penalty for failure to register as a sex offender under two provisions of the Wetterling Act that took effect in November 1998 and remained in effect until 2009: 42 U.S.C. 14072(i)(3) and (4).[7] The court of appeals therefore took a wrong turn at the outset of its constitutional analysis when it stated that "before the passage of SORNA, [respondent] was subject only to state, not federal, registration obligations." Pet. App. 5a n.4.

1. Originally, federal sex-offender legislation "relied on state-level enforcement." *Carr*, 130 S. Ct. at 2238. But Congress gradually added federal criminal penalties to "supplement[] state enforcement mechanisms." *Id.* at 2239. One such provision was Section 14072(i)(3), which took effect in November 1998 and provided:

A person who is—

* * * * *

"before the passage of SORNA, [respondent] was subject only to state, not federal, registration obligations." Pet. App. 5a n.4.

[7] See 1998 Appropriations Act § 115(c)(1), 111 Stat. 2467 (setting November 1998 effective date); SORNA §§ 124, 129, 120 Stat. 598, 600 (repealing Wetterling Act upon completion of three-year implementation period for SORNA); see also 64 Fed. Reg. 585 (Jan. 5, 1999) (noting that the 1998 Appropriations Act had "amended the federal failure-to-register offense (42 U.S.C. 14072(i)) in order to bring within its scope federal and military sex offenders who fail to register").

> (3) described in section 4042(c)(4) of title 18, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation; * * *
>
> * * * shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

42 U.S.C. 14072(i). The cross-referenced paragraph provided that "[a] person is described in this paragraph if the person was convicted of" certain enumerated offenses in title 18 of the United States Code or of "[a]ny other offense[s] designated by the Attorney General as a sexual offense for purposes of this subsection." 18 U.S.C. 4042(c)(4)(A)-(E) (2000).

In 1998, the Attorney General delegated his authority under Section 4042(c)(4)(E) to the Director of the Bureau of Prisons (BOP). See 63 Fed. Reg. 69,386 (Dec. 16, 1998). The Director, in turn, exercised that authority by designating, *inter alia*, the military offense of carnal knowledge in violation of Article 120(b) of the Uniform Code of Military Justice as a "sexual offense[] for purposes of 18 U.S.C. 4042(c)." 28 C.F.R. 571.72(b)(2).[8]

Accordingly, at the time of respondent's offense, conviction, and release in 1999 and until well after SORNA's enactment, Section 14072(i)(3) applied to respondent and subjected him to a federal criminal penalty for any knowing failure to register as a sex offender

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[8] In light of SORNA's repeal of Section 4042(c)(4), BOP recently proposed deleting the regulation. See 78 Fed. Reg. 9353-9355 (Feb. 8, 2013).

in any State in which he lived, worked, or attended school.

Respondent has contended (Br. in Opp. 23-24) that Section 14072(i)(3) "did not apply to persons, like [him], who were in military custody," because Section 4042 was generally addressed to duties imposed on the BOP, and because 18 U.S.C. 4042(d) specifically stated that "[t]his section shall not apply to military or naval penal or correctional institutions or the persons confined therein." But that merely means that Section 4042's substantive directions to BOP personnel—*e.g.*, to provide notice to state and local authorities when sex offenders were released from prison or placed on probation—were immaterial to respondent while he was in military custody. They do not alter the applicability of Congress's cross-reference to a specific paragraph within that section, which did not refer to BOP's duties but to a list of persons convicted of certain offenses, without any reference to their place of confinement. That list included respondent's military offense, making him a person "described in [S]ection 4042(c)(4)" and therefore triggering the federal failure-to-register penalty in Section 14072(i)(3).

2. The second relevant Wetterling Act provision, Section 14072(i)(4), which also took effect in November 1998 (see note 7, *supra*), provided as follows:

> A person who is—
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> * * * * *
>
> (4) sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105-119, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or

> sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

42 U.S.C. 14072(i). The cross-referenced provision of Public Law 105-119 (*i.e.*, the 1998 Appropriations Act) required the Secretary of Defense to "specify categories of conduct punishable under the Uniform Code of Military Justice which encompass a range of conduct comparable to that described in [42 U.S.C. 14071(a)(3)(A) and (B)], and such other conduct as the Secretary deems appropriate." § 115(a)(8)(C), 111 Stat. 2466.

On December 23, 1998, an Acting Assistant Secretary of Defense, exercising delegated authority, issued a "directive-type memorandum," which was "effective immediately" and designated "covered military offenses" for purposes of "sex offender registration requirements." Pet. App. 171a, 172a, 174a, 175a. The designated offenses included respondent's offense of conviction: carnal knowledge under Article 120(b) of the Uniform Code of Military Justice. *Id.* at 175a.

Accordingly, at the time of his offense, before his release in 1999, and until well after SORNA's enactment, Section 14072(i)(4) applied to respondent and subjected him to federal criminal penalties for any knowing failure to register as a sex offender in any State in which he lived, worked, or attended school. 42 U.S.C. 14072(i)(4); Pet. App. 42a & n.1, 43a-44a, 46a (Owen, J., concurring in the judgment).[9]

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[9] Although the government did not rely on Section 14072(i)(4) in the court of appeals, Judge Owen recognized that respondent had a federal registration obligation under 42 U.S.C. 14072(i)(4) when he

Respondent has suggested (Br. in Opp. 26) that "it appears that he was not subject to [Section] 14072(i)(4)" because the December 1998 memorandum contemplated that the Secretaries of each military department would take further "steps to fully implement the requirements of Federal law" with respect to registration and notification. Pet. App. 172a. Respondent contends (Br. in Opp. 26) that full implementation did not occur "until December 17, 1999," when "the list of specified UCMJ offenses was added to Department of Defense Instruction 1325.7." But Section 14072(i)(4) was not limited by an unstated full-implementation condition. Instead, that provision applied to those who had been "sentenced by a court martial for conduct" specified in the December 1998 memorandum, which was "effective immediately." Pet. App. 174a. Respondent was therefore subject to a potential federal penalty under Section 14072(i)(4) for a knowing failure to register, whether or not the Air Force or the Department of Defense had fully implemented its procedures concerning sex-offender notifica-

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completed his sentence and that he could have been prosecuted under federal law for failing to register. See Pet. App. 42a-44a & n.1. Judge Owen concurred in the judgment reversing respondent's conviction because, in her view, SORNA had expanded the preexisting federal obligation and increased the authorized punishment. *Id.* at 46a. But those adjustments in scope and degree do not change the relevant point: Congress continuously exercised regulatory authority over respondent, requiring him to register as a sex offender in any State where he resides, works, or attends school and imposing criminal penalties for the failure to do so. SORNA's alteration of the specific features of the federal regulatory scheme did not alter its essential character. Nor did its alteration of the collateral consequences of respondent's federal conviction implicate ex-post-facto concerns. See note 5, *supra*.

tion before he was released from military custody in September 1999.[10]

3. Although Judge Owen and Judge Haynes explained in their concurring and dissenting opinions that respondent was subject to Section 14072(i)(3) and (4), Pet. App. 42a-44a & n.4, 66a-70a, the court of appeals concluded that pre-SORNA law imposed federal registration requirements only on those sex offenders who were required to register directly with the FBI because they resided in States where, unlike respondent's State of residence, sex-offender-registration programs did not meet minimum federal standards. *Id.* at 4a n.4. By focusing only on the distinct requirement that sex offenders in non-compliant States register directly with the FBI, see 42 U.S.C. 14072(a)(3), (c), (g)(2) and (i)(1), the court of appeals overlooked the federal registration requirements that were imposed on federally convicted sex offenders by virtue of Section 14072(i)(3) and (4). As Judge Haynes explained in her dissent, "[w]hether a state was minimally compliant or not affected *where* [a federally convicted sex offender] was to register"—*i.e.*, with the FBI or with state authorities—"but not *whether* he had to register." Pet. App. 70a n.7.

Respondent contends (Br. in Opp. 22) that Section 14072(i) did not establish "federal *registration* requirements" because it penalized a failure to register as re-

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[10] Treating the specification of offenses as distinct from the ensuing implementation process is consistent with the structure of the authorizing statute that was cross-referenced in Section 14072(i)(4). That provision separated into different clauses the Secretary's initial duty to "specify" qualifying offenses and the additional requirement that he "prescribe procedures and implement a [notification] system" "[i]n relation to persons sentenced by a court martial for conduct in the categories [that he has] specified." 1998 Appropriations Act § 115(a)(8)(C)(i) and (ii), 111 Stat. 2466.

quired by *state* law. See 42 U.S.C. 14072(i)(3) and (4) (providing penalties for persons who "fail[] to register in any State"). But even now, 42 U.S.C. 16913(a)—the provision of SORNA that respondent identifies as an example of a "free-standing federal registration requirement," Br. in Opp. 22—requires sex offenders, as a matter of federal law, to register with States, not with the federal government. A federal law that imposes federal criminal sanctions for failure to register is a "federal registration requirement" under any reasonable understanding of that phrase. That is true even if Texas law also required respondent to register, as it did.[11] Congress's provision of separate sanctions for the failure to register with available state registries represented a federal requirement.

Accordingly, Congress did not relinquish federal authority over respondent when he completed his military sentence in 1999. To the contrary, in prescribing Section 14072(i)'s criminal penalties for a sex offender's failure to register, Congress asserted its Article I power over federal sex offenders such as respondent as early as 1998. As a result, with respect to those offenders, SORNA's subsequent enactment did not, as the court of

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[11] Since 1997, Texas law has required sex-offender registration by someone convicted under the Uniform Code of Military Justice of an offense that was "substantially similar" to certain enumerated Texas offenses, including, as relevant here, sexual assault. See Tex. Code Crim. Proc. Ann. art. 62.001(5)(A) and (H) (West Supp. 2012); *id.* art. 62.01(5)(A) and (I) (West Supp. 1998) (version that took effect in 1997). According to the Texas Sex Offender Registry, respondent first registered on May 11, 2004—long before SORNA was enacted. See Tex. Dep't of Pub. Safety, *TxDPS Sex Offender Registry*, https://records.txdps.state.tx.us/SexOffender/PublicSite/Application/Search/Individual.aspx?IND_IDN=6843376 (last visited Feb. 24, 2013).

appeals believed, require Congress to "reassert jurisdiction over [their] intrastate activities." Pet. App. 2a.

B. The Court Of Appeals' Threshold Error About Federal Jurisdiction Over Respondent In 1999 Vitiates Its Constitutional Analysis

The court of appeals' threshold error about federal sex offenders' pre-SORNA registration obligations was the linchpin of its constitutional analysis. In describing the category of federal sex offenders that it believed fell outside Congress's reach, the court's opinion used the phrase "unconditionally released" or "unconditional release" nine times. Pet. App. 2a, 3a, 4a & n.4, 6a, 11a, 23a, 41a, 42a. While respondent has suggested (Br. in Opp. 18-21) that "[p]re-SORNA sex offender registration law" was relevant to only one factor (the second) of the court of appeals' Necessary and Proper Clause analysis under *United States* v. *Comstock*, 130 S. Ct. 1949 (2010), the point was part of the court's analysis of the third, fourth, and fifth *Comstock* factors as well. See Pet. App. 11a-12a, 18a, 20a, 23a. And the unconditional-release premise was part of the court's repeated articulations of its constitutional holding. *Id.* at 2a, 4a, 41a. In short, the constitutional analysis in the decision below was "based almost exclusively" on the conclusion that respondent was "'long ago unconditionally released from custody.'" *United States* v. *Elk Shoulder*, 696 F.3d 922, 932 (9th Cir. 2012) (quoting Pet. App. 11a).[12]

If this Court corrects that threshold error, the Court could remand the case to the Fifth Circuit and permit

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[12] The defendant in *Elk Shoulder* filed a petition for rehearing en banc, and the Ninth Circuit stayed proceedings pending the decision in this case. See 10-30072 Docket entry Nos. 49 & 52 (Jan. 4 & 18, 2013).

that court to revisit its analysis based on a proper understanding of the pre-SORNA federal sex-offender-registration obligations applicable to respondent. See Pet. 22-24; see also *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) ("[W]hen we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing.").

Alternatively, the Court could reverse the judgment outright. The court of appeals recognized, correctly, that Congress does have the constitutional authority to require registration by federal sex offenders who are "subject to federal custody or supervision when [the registration requirement is] enacted, or who [are later] convicted" of a federal sex offense. Pet. App. 42a; see *id.* at 24a n.37 (noting that "SORNA is perfectly constitutional" with respect to persons convicted after its enactment). Respondent was convicted of his federal sex offense in June 1999, after Section 14072(i)(3) and (4) had already taken effect and been made applicable to his offense. Thus, under the court of appeals' own constitutional reasoning, which was correct on this point, Congress's assertion of federal jurisdiction over respondent in the Wetterling Act—in the form of a federal penalty for failure to register—was unquestionably valid. See *id.* at 66a (Haynes, J., dissenting) ("The majority opinion and [respondent] * * * agree * * * that if SORNA had been implemented while [respondent] was in custody or subject to supervised release," the constitutional objection "would not apply.").

If Congress had the power to impose the collateral consequence of sex-offender registration on respondent when he was convicted, it retained the power when it enacted SORNA to continue requiring him to register

as a sex offender. SORNA replaced the Wetterling Act with a more comprehensive sex-offender-registration system. But the changes made by SORNA were irrelevant to the limits of Congress's Article I authority. Pet. App. 72a (Haynes, J., dissenting) ("It makes little sense to contend that Congress lost its power or 'jurisdictional hook' over [respondent] simply because it updated the national sex-offender registration system laws."). Accordingly, the decision below can be reversed on the ground that the federal government never surrendered its valid assertion of jurisdiction to penalize respondent for failing to register in his State of residence, and, accordingly, his as-applied challenge to SORNA fails.[13]

II. CONGRESS HAS AUTHORITY TO REQUIRE REGISTRATION BY FEDERAL SEX OFFENDERS WHO PREVIOUSLY COMPLETED THEIR FEDERAL SENTENCES

Even assuming that respondent was not, when he was released in 1999, already subject to a potential federal penalty if he failed to register as a sex offender, the court of appeals still erred in concluding that Congress lacks authority to criminalize respondent's failure to update his registration following an intrastate change of residence. As applied to a person convicted of a federal sex offense and unconditionally released from federal

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[13] That resolution would likely suffice to resolve pending cases in the courts of appeals involving Article I challenges to Section 2250(a)(2)(A). See *Elk Shoulder*, 696 F.3d at 931 n.10 (noting that defendant was on federal supervised release when SORNA was enacted); *United States* v. *Brunner*, No. 11-2115 (2d Cir. argued June 21, 2012) (involving defendant who was released from imprisonment and discharged from the military in 2003); *United States* v. *Brune*, No. 12-3322 (10th Cir. docketed Dec. 4, 2012) (involving defendant with 2001 federal conviction for possession of child pornography, which would trigger Section 14072(i)(3), see 28 C.F.R. 571.72(a)(2)).

custody and supervision before SORNA's enactment, Section 2250(a)(2)(A) of Title 18 and the underlying registration requirement that it enforces (42 U.S.C. 16913(a)) reflect a reasonable exercise of Congress's authority to enact measures "necessary and proper for carrying into Execution" its other enumerated powers. U.S. Const. Art. I, § 8, Cl. 18. Considered in relation solely to respondent's federal criminal offense, the federal-offender provision in Section 2250(a)(2)(A) is valid. Taking into account the considerations the Court set forth in upholding federal civil commitment of sexually dangerous federal prisoners after their federal sentences had expired, the enumerated power that supports an individual's sex-offense conviction also supports the failure-to-register penalty. See *Comstock*, *supra*. And, within the broader context of SORNA, Section 2250(a)(2)(A) is also justified as a rational component of Congress's overall scheme, which draws on a combination of enumerated powers. Under that scheme, Congress acted in conjunction with the States to make the prior "patchwork" of registration systems in all 50 States "more uniform and effective." *Reynolds* v. *United States*, 132 S. Ct. 975, 978 (2012). It did so by creating and supporting "a comprehensive national system for the registration of [federal and state sex] offenders," 42 U.S.C. 16901, in which the federal government accepted a "special role in ensuring compliance with SORNA's registration requirements by federal offenders." *Carr*, 130 S. Ct. at 2238.

A. Section 2250(a)(2)(A) Is A Necessary And Proper Measure Under The Enumerated Powers That Support Federal Sex Offenders' Statutes Of Conviction

The Necessary and Proper Clause grants Congress the authority "[t]o make all Laws which shall be neces-

sary and proper for carrying into Execution" its enumerated powers. U.S. Const. Art. I, § 8, Cl. 18. The clause gives Congress "discretion" to choose the "means by which the powers [the Constitution] confers are to be carried into execution," as long as those means are "appropriate" and "not prohibited," and as long as the end they serve is "legitimate" and "within the scope of the [C]onstitution." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); see also *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2592 (2012) (*NFIB*) (opinion of Roberts, C.J.) (noting the Court has "been very deferential to Congress's determination that a regulation is 'necessary'" and has "thus upheld laws that are '"convenient, or useful" or "conducive" to the authority's "'beneficial exercise"'") (citation omitted).

In *Comstock*, the Court considered the constitutionality of 18 U.S.C. 4248, which was enacted as part of the same public law that included SORNA. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 302(4), 120 Stat. 620. Section 4248 provides for potentially indefinite federal civil commitment of "a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released." *Comstock*, 130 S. Ct. at 1954. The Court held that Section 4248 "is a 'necessary and proper' means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others." *Id.* at 1965.

Like the civil-commitment statute in *Comstock*, SORNA's registration provision and criminal penalty for federal sex offenders are "means * * * 'reasonably

adapted' to the attainment of a legitimate end under" the enumerated powers that justify the creation of the offenders' statutes of conviction. *Comstock*, 130 S. Ct. at 1957 (quoting *Gonzales* v. *Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring in the judgment)); see *id.* at 1969 (Alito, J., concurring in the judgment) (Section 4248 "is a necessary and proper means of carrying into execution the enumerated powers that support the federal criminal statutes under which the affected prisoners were convicted."). The existence and duration of the registration duty that SORNA imposes on federal sex offenders is tied to the offenders' underlying statutes of conviction, see 42 U.S.C. 16911(1)-(6), 16915(a), and those statutes are supported by various enumerated powers. Here, the relevant statute—Article 120(b) of the Uniform Code of Military Justice, 10 U.S.C. 920(b)—is supported by Congress's authority "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14.[14]

The Necessary and Proper Clause vests in Congress the authority not only to criminalize the underlying conduct, but to imprison individuals who engage in that conduct, to take steps to ensure the safety of the surrounding community, and to enact laws governing federal offenders' behavior during and after the custodial

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[14] Other federal sex offenses are supported by Congress's Commerce Clause power (U.S. Const. Art. I, § 8, Cl. 3) to prohibit and punish sexual misconduct that involves interstate movement or transmissions. See, *e.g.*, 18 U.S.C. 2423 (illicit interstate transportation of minors); 18 U.S.C. 2252A(a)(1) (Supp. V 2011) (mailing of child pornography). Still others are, for example, supported by the authority "[t]o make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2; see, *e.g*, 18 U.S.C. 2252A(a)(4) (2006 & Supp. V 2011) (possession of child pornography in federal territory or property).

portion of a sentence. See *Comstock*, 130 S. Ct. at 1958, 1964; *id.* at 1969-1970 (Alito, J., concurring in the judgment). Thus, Congress has created a federal prison system, installed a system of supervised release and probation to monitor the post-release behavior of federal offenders, and required prison and court personnel to notify local authorities of the impending release or change of residence of federal offenders convicted of certain crimes, including sex offenses.[15] None of those things is expressly enumerated in the Constitution, but the Necessary and Proper Clause grants Congress the discretion and authority to do each of them.

Sex-offender registration and notification is a "legitimate" collateral consequence of conviction. *Smith* v. *Doe*, 538 U.S. 84, 102-104 (2003). Congress therefore has the power to require federal sex offenders to register with state sex-offender registries following their release and to penalize their failure to do so. See *Elk Shoulder*, 696 F.3d at 929 (the undisputed authority to enact the defendant's crime of conviction "gave Congress the power to enact laws to ensure the safety of the surrounding communities by regulating and monitoring post-release behavior").

Section 2250(a)(2)(A) is reasonably adapted to serve those legitimate ends, enforcing sex-offender-registration obligations for individuals whose underlying federal offenses were of a sexual nature. That ensures a closer relationship to the underlying federal power that sup-

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[15] See, *e.g.*, 18 U.S.C. 3621 (2006 & Supp. V 2011) (providing for imprisonment of a convicted person); 18 U.S.C. 3561-3566, 3583 (2006 & Supp. V 2011) (providing for probation and supervised release); 18 U.S.C. 4042 (2006 & Supp. V 2011) (providing for notice to state and local officials of the release and change of residence of violent offenders, drug offenders, and sex offenders).

ported the crime than existed in *Comstock* itself. There, the Court permitted the federal government to seek civil commitment even when a federal prisoner's sexual dangerousness was unrelated to the federal crime that led to his federal imprisonment. See 130 S. Ct. at 1977 (Thomas, J., dissenting) ("§ 4248 allows a court to civilly commit an individual without finding that he was ever charged with or convicted of a federal crime involving sexual violence"). Here, the federal crime itself creates the risks addressed by sex-offender registration.

Section 2250(a)(2)(A) affects only a narrow class of individuals "who by some preexisting activity" (*i.e.*, the commission of a federal sex offense) "br[ought] themselves within the sphere of federal regulation." *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.). Indeed, this Court has already recognized, with specific reference to Section 2250(a)(2)(A), that it was "entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision." *Carr*, 130 S. Ct. at 2238. That wording encompasses not only federal sex offenders who were still serving their sentences when SORNA was enacted but also those "who typically *would have spent* some time under federal criminal supervision" before then. *Ibid.* (emphasis added).

Although it was not addressed to Congress's Article I power, the Court's description confirms Congress's judgment that the federal government has greater ties to former federal sex offenders than it does to other members of the general public, whether those sex offenders were under federal criminal supervision at the time or had completed their criminal terms. And the

Court's statutory conclusion that it was "entirely reasonable" for the federal government to take special responsibility for SORNA compliance by former federal prisoners has equal force in constitutional analysis of the fit between Congress's enumerated powers to criminalize sex offenses and the means it adopted to address the risk of recidivism by such federal offenders.[16] The logical basis for attaching a collateral registration consequence to a federal criminal conviction does not disappear at the moment of a prisoner's release. As the Court's decision in *Smith* confirms, a post-release imposition of a registration requirement serves the same valid public-protection purposes as a registration requirement imposed during supervised release. See 538 U.S. at 103-104; 42 U.S.C. 16901 (SORNA's purpose is "to protect the public from sex offenders and offenders against children"). A temporal gap in regulating federal sex offenders does not invalidate the rationality of pursuing that purpose through a registration requirement.

The power at issue here—to require that a previously released federal sex offender register with a state sex-offender registry—is inherently narrower than potentially indefinite civil commitment, both in its effect on the regulated individual and in any incursion on States' interests. See *Elk Shoulder*, 696 F.3d at 931 ("[T]he requirement to register is not nearly as significant a

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[16] The quoted passage was integral to *Carr*'s statutory-construction analysis—specifically, its reason for rejecting the government's contention that Section 2250(a)(2)(A) and (B) should be construed as having comparable breadth with respect to pre-SORNA conduct. 130 S. Ct. at 2238. It is difficult to see how the Court's conclusion about what is "entirely reasonable" could be true for purposes of determining what Congress intended to do but not for purposes of determining what Congress was permitted to do.

burden as the indefinite detention authorized in *Comstock*."). As a result, even though Section 2250(a)(2)(A) goes a step further than the civil-commitment statute (in the sense that it can first attach after the end of federal criminal custody or supervision), that difference is more than offset by the comparatively limited nature of the assertion of authority here and by the direct tie between the sexual nature of the conviction and the resulting registration obligation. See *id.* at 932 (finding "no reasoned basis for holding that a law authorizing the federal government to exercise indefinite civil custody over former federal prisoners even after they have served their sentences has less of a rational relationship to an enumerated power than an enactment requiring such former federal prisoners to provide registration information" following their release from custody).

B. The Five *Comstock* Considerations Support Section 2250(a)(2)(A)

In holding that Section 4248 is a legitimate exercise of Congress's powers under the Necessary and Proper Clause, the *Comstock* Court relied on "five considerations, taken together." 130 S. Ct. at 1956. While those "considerations" were not stated as a test that would govern all future Necessary and Proper Clause challenges, the challenge in *Comstock* is "most analogous" to respondent's constitutional objection to SORNA. Pet. App. 6a-7a. The court of appeals therefore organized its analysis around those same considerations. *Id.* at 7a-23a; see also *Elk Shoulder*, 696 F.3d at 928 ("*Comstock*'s analysis of these five factors is directly applicable to the SORNA registration statute."). Contrary to the court of appeals' conclusion, those considerations support the conclusion that Congress acted well within its Article I authority when it required federal sex offenders to reg-

ister even when their federal sentences were completed before SORNA's enactment.[17]

1. The Necessary and Proper Clause gives Congress broad authority and discretion

The first *Comstock* consideration was "the breadth of the Necessary and Proper Clause." 130 S. Ct. at 1965. That consideration is not a "fact-specific" one. Pet. App. 8a. But the Court recognized that, in determining whether a provision is "rationally related to the implementation of a constitutionally enumerated power," the "'choice of means'" is left "'primarily . . . to the judgment of Congress,'" which "'alone'" determines "'the degree of the[] necessity, the extent to which [the means] conduce to the end, the closeness of the relationship between the means adopted and the end to be attained.'" *Comstock*, 130 S. Ct. at 1956, 1957 (quoting *Burroughs* v. *United States*, 290 U.S. 534, 547-548 (1934)).

Here, the Court has not only the judgment of Congress, to which the Court's rational-basis review is "undoubtedly deferential," *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment), but also the corroborating judgment of States that reached back and imposed registration requirements on sex offenders whose sentences were completed. See *Smith*, 538 U.S.

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[17] SORNA's registration requirements apply to those with pre-SORNA convictions by virtue of the Attorney General's exercise of delegated authority to specify how the statute applies to pre-SORNA offenders. See 42 U.S.C. 16913(d); 28 C.F.R. 72.3; p. 7, *supra*. But Congress foresaw no "[]realistic possibility" that "the Attorney General would refuse to apply the new requirements to pre-Act offenders." *Reynolds*, 132 S. Ct. at 984.

at 91.[18] In a field in which it may be difficult to make an "empirical demonstration" (*Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring in the judgment)) of the effectiveness of measures that are comparatively new, the concurrence of multiple governmental actors about the soundness of an approach can provide additional confidence in its rationality.[19]

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[18] California enacted a sex-offender-registration law in 1947 (covering those who had been convicted since 1944); a dozen States had adopted sex-offender-registration laws by 1989; and 24 had done so by 1993. See Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* 30-31, 56 (2009). Within two years of Congress's 1994 decision to condition certain federal funding on the adoption of registration laws, all 50 States and the District of Columbia had enacted them. See *Smith*, 538 U.S. at 90. By 1999, well before SORNA, the registration laws in 14 States "were fully retroactive" and "often" triggered by convictions "from the distant past." Logan 71.

[19] Scholars have not reached consensus about the effectiveness of sex-offender-registration-and-notification laws. Some early studies found that they had little or no effect, but one recent analysis of offense data in 15 States concluded that "actual registration of released sex offenders is associated with a significant decrease in crime" and that "the implementation of a notification law * * * is associated with a reduction in the frequency of sex offenses," but the latter effect may be because "notification deters potential (nonregistered) offenders" and does not "reduc[e] recidivism among convicted sex offenders." J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161, 162-163, 164 (2011). A 2009 review of the research literature found only nine previous studies "with sufficiently rigorous research" and concluded that "[a]dditional research is necessary before definitive conclusions can be drawn" about the deterrent effects of registration-and-notification laws. E.K. Drake & S. Aos, Wash. State Inst. for Pub. Policy, *Doc. No. 09-06-1101, Does Sex Offender Registration and Notification Reduce Crime? A Systematic Review of the Research Literature* 1, 3 (June 2009), www.wsipp.wa.gov/rptfiles/09-06-1101.pdf. Congress need not have conclusive proof that a measure

2. Section 2250(a)(2)(A) builds upon the history of post-release supervision of federal offenders

The second *Comstock* consideration was that the statute providing for civil commitment of sexually dangerous persons was "a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades." 130 S. Ct. at 1958.

The federal government's legitimate interest in protecting the public from the risks presented by federal offenders after they are released back into the community is built on "the federal government's long history of regulating offenders after their release from incarceration through probation, parole, and supervised release." *Elk Shoulder*, 696 F.3d at 929. The federal parole system dates back to 1910 (see Parole Act, ch. 387, 36 Stat. 819), and federal probation to 1925 (see Probation Act, ch. 521, 43 Stat. 1259). By the 1940s, federal probation officers were supervising military parolees as well. See Victor H. Evjen, *The Federal Probation System: The Struggle To Achieve It and Its First 25 Years*, 39 Federal Probation 3, 13 (June 1975). The current federal supervised-release system—which generally replaced parole—pre-dated SORNA by more than 20 years. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*).

The close connection between the supervised-release system and sex-offender registration is shown by Congress's use of that system in recent years to protect communities from the post-release dangers posed by sex offenders. See *Smith*, 538 U.S. at 103 (noting "the high rate of recidivism among convicted sex offenders and

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will reduce recidivism by federal sex offenders before it can rationally find the measure a necessary-and-proper means of addressing that risk.

their dangerousness as a class"). Congress has, for instance, mandated five-year-minimum terms of supervised release (and authorized lifetime terms of supervised release) for federal sex offenders. See 18 U.S.C. 3583(k) (first enacted in 2003); see also Sentencing Guidelines § 5D1.2(b)(2), p.s. (recommending that the statutory maximum term of supervised release be imposed on federal sex offenders). It has also made compliance with sex-offender-registration requirements a mandatory condition of probation and supervised release. See 18 U.S.C. 3563(a)(8); 18 U.S.C. 3583(d) (2006 & Supp. V 2011) (third sentence).

The court of appeals refused to consider the history of post-release regulation of former federal prisoners because SORNA's registration requirement was not "a condition of [respondent's] release from prison, let alone a punishment for his crime." Pet. App. 11a. But the same was true of the potential civil commitment in *Comstock*, which would not have been a condition of supervised release and would be imposed in a proceeding that would long post-date the prisoner's sentencing (and often take place in a different district court than did the sentencing). See 130 S. Ct. at 1954-1955. The Court in *Comstock* rejected the dissent's analysis that the relationship between the federal government and a federal prisoner ends when "criminal jurisdiction over [the] prisoner ends." *Id.* at 1979 & n.12 (Thomas, J., dissenting). Instead, the Court concluded that the Necessary and Proper Clause supports Congress's "power to regulate the prisoners' behavior even after their release." *Id.* at 1964. If a registration requirement would be a valid exercise of Congress's Article I powers when imposed as part of a criminal sentence—as neither the court of appeals nor respondent could deny—then it is

equally valid when imposed later as a non-punitive collateral consequence of such a conviction.[20]

3. Section 2250(a)(2)(A) is a reasonable extension of authority over a limited category of persons who brought themselves within federal power by committing federal sex offenses

Comstock's third consideration was that Congress had "reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence." 130 S. Ct. at 1961. The Court explained that the federal government "has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose," including after their release. *Ibid.*

The federal-offender provision in Section 2250 is an equally reasonable extension of preexisting federal post-release regulation of sex offenders. Sex-offender registration regimes serve legitimate, non-punitive purposes. See *Smith*, 538 U.S. at 102-103. Here, those purposes are related directly to the actions (*i.e.*, the commission of federal sex offenses) that subjected this narrow class of individuals to federal authority in the first instance.

In finding otherwise, the court of appeals relied (Pet. App. 16a-17a) on *Comstock*'s recognition that the government had conceded that it "would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed." 130 S. Ct. at 1965 (quoting Tr. of Oral

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[20] As the court of appeals recognized, SORNA's "registration requirements are civil regulations whose purpose is not to punish." Pet. App. 11a n.17; see also note 5, *supra*.

Arg. at 9, *Comstock*, *supra* (No. 08-1224)). But, as the Court's quotation from the transcript demonstrates, the statement pertained to the limits on the government's "power to commit a person."[21] SORNA, by contrast, only requires a previously released federal sex offender to register with a state sex-offender registry—a significantly more modest assertion of power. Unlike federal civil commitment, a registration obligation leaves a sex offender in the community and subject to the State's police power. Indeed, when the Court compared Alaska's sex-offender-registration-and-notification program (which, like many other registration statutes at the time, applied retroactively) with civil commitment, it described registration as "the more minor condition." *Smith*, 538 U.S. at 104; see note 18, *supra* (in 1999, 14 States' registration laws were fully retroactive).

For the same reason, the court of appeals erred in concluding that "the chain of causation from Congress's military power to its criminalization of [respondent's] failure to register a change of address" was too long to be "reasonably adapted" to an enumerated power. Pet. App. 14a-15a.[22] As noted above, while the chain here is

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[21] The government's brief in *Comstock* (at 5 n.2) expressly noted that SORNA's "registration and notification requirements" were not "implicated by th[at] case, which deal[t] only with civil commitment by the federal government."

[22] The court of appeals suggested that Congress's power to make rules governing the land and naval forces ceased "after [respondent] was discharged from the military," Pet. App. 19a n.33, but it did so on the basis of *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955), which addressed court-martial jurisdiction over former servicemembers in derogation of Article III jurisdiction, "where persons on trial are surrounded with more constitutional safeguards than in military tribunals." *Id.* at 15; see also *Reid* v. *Covert*, 354 U.S. 1, 21 (1957) (plurality opinion) (holding that Necessary and Proper Clause would

longer in one sense than the one in *Comstock*, Section 2250(a)(2)(A) is also more directly linked to the basis of the underlying federal conviction, and the regulation that it supports—a registration requirement rather than civil commitment—is far more modest.

Upholding Section 2250(a)(2)(A) does not imply that Congress has "never-ending jurisdiction to regulate anyone who was ever convicted of a federal crime of any sort." Pet. App. 19a-20a. The provision does not apply to "any sort" of federal crime, but is instead specifically tailored to the risks associated with sex offenders, whose "high rate of recidivism" and "dangerousness as a class" this Court has already recognized. *Smith*, 538 U.S. at 103. The court of appeals' concern about "never-ending jurisdiction" cannot be reconciled with its recognition that SORNA's registration and penalty provisions *will* apply to all federal sex offenders going forward, even long after they have completed their terms of imprisonment and supervised release. Pet. App. 41a-42a; see, *e.g.*, 42 U.S.C. 16915 (2006 & Supp. V 2011) (registration required for 10 years, 15 years, 25 years, or life depending on crime and subsequent conduct). Nor does it make sense to conclude that Congress has the Article I authority to permit lifetime supervised release, including a mandatory registration condition, for federal sex offenders, see 18 U.S.C. 3583(d) (2006 & Supp. V 2011); 18 U.S.C. 3583(k), but it simultaneously lacks the power to impose a lesser restriction: a collateral, civil requirement to register, which, after the end of any period of supervised release, can be enforced only in a separate

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not support military-tribunal jurisdiction over servicemembers' wives in light of "Article III and the Fifth, Sixth, and Eighth Amendments"). Section 2250(a)(2)(A) does not deprive respondent of any of the procedural safeguards guaranteed by the Constitution.

proceeding subject to the panoply of constitutional safeguards applicable in a prosecution. Compare 18 U.S.C. 2250, with 18 U.S.C. 3583(e)(3) (providing for revocation of supervised release and imprisonment if court finds violation by a preponderance of the evidence).

4. Section 2250(a)(2)(A) accommodates state interests

The fourth *Comstock* consideration—whether "the statute properly accounts for state interests," 130 S. Ct. at 1962—also provides strong support for Section 2250(a)(2)(A). As with the civil-commitment statute in *Comstock*, SORNA's federal-offender provision does not "invade state sovereignty or otherwise improperly limit the scope of powers that remain with the States." *Ibid.* (internal quotation marks and citation omitted). To the contrary, SORNA is an example of cooperative federalism. States are not forced to incorporate SORNA's requirements into their registration programs; they simply face a possible 10% reduction of federal justice assistance funding under a particular program if they fail to do so. See 42 U.S.C. 16925(a); see also 42 U.S.C. 16925(d) ("The provisions of [SORNA] that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section."). That financial penalty is "relatively mild encouragement" rather than "a gun to the head." *NFIB*, 132 S. Ct. at 2604 (opinion of Roberts, C.J.) (citation omitted); see *South Dakota* v. *Dole*, 483 U.S. 203, 212 (1987).[23]

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[23] A Texas legislative study predicted that Texas would lose $2.2 million of its Byrne Justice Assistance Grant in fiscal year 2010. See Legislative Budget Bd. Staff, *Texas State Government Effectiveness and Efficiency* 358 (Jan. 2011), www.lbb.state.tx.us/Government/Government Effectiveness and Efficiency Report 2011.pdf. In practice, the penalties have been significantly smaller. During fiscal year

Moreover, a prosecution under Section 2250 depends on a State's enforcement of a registration scheme. A sex offender cannot register in the "jurisdiction[s] where the offender resides, * * * is an employee, and * * * is a student" (42 U.S.C. 16913(a)) unless those jurisdictions are willing to accept his registration information. If a State's unwillingness prevents a federal sex offender from registering, then SORNA's express impossibility defense (18 U.S.C. 2250(b)) will preclude a prosecution under Section 2250. See *Kennedy* v. *Allera*, 612 F.3d 261, 269 (4th Cir.) ("[T]he criminal provisions of SORNA also recognize that a State can refuse registration inasmuch as they allow" Section 2250(b)'s affirmative defense.), cert. denied, 131 S. Ct. 554 (2010).

The court of appeals faulted SORNA for failing to provide for a state "veto of the sort present in *Comstock*." Pet. App. 22a. But the veto in *Comstock* was hardly unqualified. That statute allows a State to prevent federal civil commitment only when it is willing to assume the burden of the offender's "custody, care, and treatment," 18 U.S.C. 4248(d), which is unlikely in relation to a federal prisoner. See *Comstock*, 130 S. Ct. at 1962-1963; *id.* at 1970 (Alito, J., concurring in the judgment); *id.* at 1982 (Thomas, J., dissenting) (noting 29 States had appeared as amici and said they "would rather the Federal Government bear th[e] expense"). In any event, neither the majority nor the dissent in *Com-*

2012, the grant amounts that were reallocated in other States pursuant to 42 U.S.C. 16925(c), which corresponded to the penalties they would otherwise have incurred, ranged from $29,462 (for North Dakota) to $397,457 (for New York). See *Awards Made for "BJA FY 12 Solicited - SORNA,"* http://grants.ojp.usdoj.gov:85/selector/title?solicitationTitle=BJA FY 12 Solicited SORNA&po=BJA (last visited Feb. 24, 2013).

stock deemed a state "veto" an essential accommodation of state interests. *Id.* at 1963 (explaining that the civil-commitment statute sustained in *Greenwood* v. *United States*, 350 U.S. 366 (1956), lacked any requirement that the Attorney General "encourage the relevant States to take custody of the individual"); *id.* at 1982 (Thomas, J., dissenting) ("Section 4248's right of first refusal is thus not a matter of constitutional necessity, but an act of legislative grace.").

The court of appeals also suggested that SORNA prevents States from using "a more moderate" approach because it subjects offenders residing in a State to federal penalties for conduct that may not violate the precise timing requirements of—or be punished as severely by—the State's registration laws. Pet. App. 21a-22a. But the court identified no instances in which Section 2250(a)(2)(A) has been used to prosecute offenders who had violated federal, but not state, registration requirements. In any event, the court's concern is especially misplaced in this case, where Texas imposed timing requirements on respondent that were more demanding than those mandated by SORNA. Compare *id.* at 167a-168a (noting that respondent signed a form acknowledging his Texas-law duty to report in person at least seven days *before* an anticipated move and again within seven days *after* the move), with 42 U.S.C. 16913(c) (federal provision requiring registration to be updated within three business days after move). Here, respondent's failure to update his registration for more than six months after his change of residence (Pet. App. 168a-169a) plainly violated both state and federal deadlines. Moreover, because he is subject to a lifetime duty to register under Texas law and a duty to verify his registration every 90 days (*id.* at 167a), a first offense by re-

spondent for failure to register would be a second-degree felony under Texas law, punishable by a term of imprisonment between 2 and 20 years. See Tex. Code Crim. Proc. art. 62.102(b)(3) (West 2006); Tex. Penal Code Ann. § 12.33(a) (West 2011). Compare 18 U.S.C. 2250(a) (ten-year-maximum federal sentence); Pet. App. 78a (respondent's sentence was a year and a day).

5. Section 2250(a)(2)(A) is narrow in scope and not too attenuated from the powers that support the underlying federal sex offenses

The final *Comstock* consideration was that "the links" between the civil-commitment statute "and an enumerated Article I power [were] not too attenuated," and the statute was not "too sweeping in its scope." 130 S. Ct. at 1963. The same is true of the SORNA registration requirement and underlying criminal penalty applicable to federal sex offenders.

Comstock rejected the contention that Section 4248 exceeded Congress's authority because it was "more than a single step" removed from an enumerated power. 130 S. Ct. at 1964. Section 4248, the Court instead held, was supported by "the same enumerated power that justifies creation of a federal criminal statute," which also justifies Congress's authority to imprison people for violating that statute and "to regulate the prisoners' behavior even after their release." *Ibid.* Similarly here, "[i]t is a small step from Congress's power" to criminalize conduct and "protect the public from federal convicts even after their release, to requiring federal convicts who may be dangerous to the public to provide information regarding their residence, and punishing those who fail to do so." *Elk Shoulder*, 696 F.3d at 930-931 (citation omitted).

In addition, the challenged provisions of SORNA are "narrow in scope," *Comstock*, 130 S. Ct. at 1964, and constitute "a discrete and narrow exercise of authority over a small class of persons [who have] already [been] subject to the federal [government's] power," *id.* at 1968 (Kennedy, J., concurring in the judgment). SORNA's criminal penalty applies only to sex offenders, whose presence in the community has repeatedly been recognized as raising grave public-safety concerns. See *Reynolds*, 132 S. Ct. at 982-983; *Smith*, 538 U.S. at 103. Even within that class of persons, the provisions at issue apply only to those convicted under federal law, a subclass for whom it is "entirely reasonable" for the federal government to have "a special role in ensuring compliance" with registration requirements. *Carr*, 130 S. Ct. at 2238. Upholding SORNA's application in these narrow circumstances does not risk "confer[ring] on Congress a general 'police power'" of the kind that the Constitution "'reposed in the States.'" *Comstock*, 130 S. Ct. at 1964 (quoting *United States* v. *Morrison*, 529 U.S. 598, 618 (2000)).

C. Section 2250's Federal-Offender-Specific Provision Is A Focused And Rational Component Of A Comprehensive National Framework That Rests On Multiple Enumerated Powers

As discussed above, Section 2250(a)(2)(A)'s penalty for federal offenders is a necessary and proper means of effectuating the power that supported the criminalization of a federal sex offender's offense of conviction. But, "Section 2250 is not a stand-alone response to the problem of missing sex offenders; it is embedded in a broader statutory scheme enacted to address the deficiencies in prior law." *Carr*, 130 S. Ct. at 2240. Within that broader context, Section 2250(a)(2)(A) is also a fo-

cused and rational component of a comprehensive program—resting on multiple enumerated powers and reinforcing States' efforts rather than supplanting them—to address the risks associated with a mobile sex-offender population. It is accordingly necessary and proper to effectuate those enumerated powers as well.

1. Congress employed multiple enumerated powers in establishing SORNA's "comprehensive national [registration] system" "to protect the public from sex offenders and offenders against children." 42 U.S.C. 16901. As it had done since 1994, see *Carr*, 130 S. Ct. at 2232, Congress used its Spending Clause authority (U.S. Const. Art. I, § 8, Cl. 1) to encourage States to create "more uniform and effective" registration systems, *Reynolds*, 132 S. Ct. at 978. But Congress did not rely on States alone to bear the entire burden of implementing and enforcing SORNA's reforms.

Various provisions of SORNA—also resting on Congress's power to authorize expenditures for the general welfare—prescribe federal action and depend on cooperation between federal and state law-enforcement authorities. See 73 Fed. Reg. at 38,034 (explaining that SORNA provides incentives for States to incorporate its registration and notification requirements into their own programs and that "[t]he overall SORNA scheme also incorporates federal superstructure and assistance measures that support and leverage the [States'] programs"); *id.* at 38,045 ("SORNA strengthens the federal superstructure elements that leverage and support the sex offender registration and notification programs of the [States]."). Congress required the Attorney General, *inter alia*, to maintain a "National Sex Offender Registry" with information about "each sex offender" nationwide, to ensure that updated registration infor-

mation about sex offenders be electronically transmitted to "all relevant jurisdictions," to maintain a public website with "relevant information for each sex offender," and, in consultation with States and other jurisdictions, to "develop and support software to enable jurisdictions to establish and operate uniform sex offender registries and Internet sites." 42 U.S.C. 16919(a) and (b), 16920, 16923. Congress also created an office within the Department of Justice to assist States and other jurisdictions in implementing registration-and-notification standards. 42 U.S.C. 16945.[24] Consistent with Congress's concern about sex offenders who had gone "missing" despite earlier registration programs, see *Carr*, 130 S. Ct. at 2240, SORNA affirmatively requires the use of federal-law-enforcement resources "to assist jurisdictions in locating and apprehending sex offenders who violate [their] registration requirements." 42 U.S.C. 16941. That assistance is far from illusory; the Sex Offender Investigations Branch within the United States Marshals Service apprehended 3683 sex offenders in fiscal year 2009 who had "failed to register or were noncompliant." U.S. Marshals Service, *Fact Sheets*, www.usmarshals.gov/duties/factsheets/iod-1209.html (last visited Feb. 24, 2013).

To prevent sex offenders from "us[ing] the channels of interstate commerce [to] evad[e]" individual States' reach (*Carr*, 130 S. Ct. at 2238), Congress also exercised its authority under the Commerce Clause (U.S. Const.

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[24] In addition to reallocated Byrne grants (see notes 2 & 23, *supra*), the SMART Office has awarded more than $50 million in SORNA implementation grants to state and tribal jurisdictions since 2008. See SMART Office, *Funding Opportunities*, www.smart.gov/funding.htm (last visited Feb. 24, 2013) (linking to lists of annual grant recipients, some of which include amounts).

Art. I, § 8, Cl. 3), as supplemented by the Necessary and Proper Clause, to enact a criminal penalty applicable to a sex offender who "travels in interstate or foreign commerce" and "knowingly fails to register or update a registration as required" by SORNA. 18 U.S.C. 2250(a)(2)(B) and (3); see *Carr*, 130 S. Ct. at 2238. That prohibition follows a long tradition of federal statutes aimed at "keep[ing] the channels of interstate commerce free from immoral and injurious uses." *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917); see also *United States* v. *Lopez*, 514 U.S. 549, 558 (1995).[25]

Congress also provided for SORNA's implementation by the District of Columbia, federal territories, and Indian Tribes (42 U.S.C. 16911(10), 16927), thus exercising its constitutional authority to legislate with respect to the District of Columbia (Art. I, § 8, Cl. 17) and with respect to "the Territory or other Property belonging to the United States" (Art. IV, § 3, Cl. 2), as well as the various sources of its powers over Indian affairs (see *United States* v. *Lara*, 541 U.S. 193, 200 (2004)).

2. Section 2250(a)(2)(A) is necessary and proper to help effectuate the legitimate end that Congress pursued in SORNA (a comprehensive national registration system to help protect the public from the risks posed by sex offenders) pursuant to its Spending Clause, Commerce Clause, Property Clause, and other powers. Cf. *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment) ("Congress may regulate even noneconomic

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[25] Every court of appeals to consider a Commerce Clause challenge to Section 2250(a)(2)(B) has rejected it, see *United States* v. *Parks*, 698 F.3d 1, 7 & n.5 (1st Cir. 2012) (collecting cases), petition for cert. pending, No. 12-8185 (filed Jan. 10, 2013), and this Court has denied review of the question more than a dozen times, most recently in *Clark* v. *United States*, No. 12-6067 (Jan. 14, 2013).

local activity if that regulation is a necessary part of a more general regulation of interstate commerce").

Having identified a dangerous trend of sex offenders' failures to comply with existing registration laws (see *House Report* 23-26), Congress reasonably concluded that stronger criminal penalties were necessary to support revised registration requirements and were an appropriate means of ensuring that the federal funds invested in creating and enforcing a comprehensive national sex-offender-registration system were well spent. The federal funding and logistical support offered to States for their sex-offender-registration-and-notification programs can be effective only if persons required to register actually do so. Congress may impose penalties on such individuals as a means of achieving that goal. See *Sabri* v. *United States*, 541 U.S. 600, 605-606 (2004) (upholding criminal statute that prohibited bribes paid to agents of a federally funded entity as a necessary and proper means of effectuating Congress's Spending Clause authority); *Comstock*, 130 S. Ct. at 1969 (Alito, J., concurring in the judgment) ("[M]ost federal criminal statutes rest upon a congressional judgment that, in order to execute one or more of the powers conferred on Congress, it is necessary and proper to criminalize certain conduct."). Although Section 2250(a)(2) subjects federal (but not state) sex offenders to criminal penalties in the absence of interstate travel, this Court has already recognized that it was "entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders." *Carr*, 130 S. Ct. at 2238; see pp. 34-35, *supra*. By assuming a special enforcement role with federal offenders, Congress attested to its willingness to work co-

operatively with States and to shoulder some of the burden of implementing SORNA with respect to a class of sex offenders who had violated federal law.

3. The few recent cases in which the Court has concluded that a statute exceeded Congress's enumerated powers have been animated principally by concerns that it would substantially expand federal power and do so at the expense of traditional state prerogatives. See, *e.g.*, *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.); *Morrison*, 529 U.S. at 618; *Lopez*, 514 U.S. at 567; *id.* at 580 (Kennedy, J., concurring). But federal authority here can be exercised only in tandem with state consent. Section 2250's criminal penalties cannot be enforced if a State is unwilling to register the offender. See 18 U.S.C. 2250(b). And, when SORNA is considered more broadly, it does not compel state compliance at all, as courts of appeals have consistently recognized in rejecting Tenth Amendment challenges to it. See, *e.g.*, *United States* v. *Felts*, 674 F.3d 599, 608 (6th Cir. 2012); *Kennedy*, 612 F.3d at 269; cf. *Printz* v. *United States*, 521 U.S. 898, 935 (1997). Instead, SORNA conditions a small percentage of federal funding under one grant program on the adoption of federal standards, which is plainly permissible. See *Dole*, 483 U.S. at 212. Moreover, it does so to aid efforts—first initiated at the state level—to track sex offenders, alert the public to their presence, and thereby prevent future sex crimes.

As the court of appeals observed (Pet. App. 20a), SORNA does touch on one area of traditional state authority—defining criminal conduct, see *Lopez*, 514 U.S. at 561 n.3—by requiring that States prescribe failure-to-register offenses carrying a maximum punishment of more than one year of imprisonment (or else lose a modest amount of federal funding). See 42 U.S.C. 16913(e),

16925(d). That provision, of course, is not at issue here. In any event, that funding condition hardly supplants state policy choices. Before SORNA, every State had already criminalized sex offenders' failure to register, and federal criminal penalties for violating those registration requirements had existed for almost a decade. See pp. 3-4, *supra*; note 18 *supra*. Congress simply sought to make those laws more uniform by ensuring that failure-to-register offenses were treated as crimes of comparable gravity nationwide. See 73 Fed. Reg. at 38,069 ("SORNA contemplates that substantial criminal penalties will be available for registration violations at the state, local, and federal levels."). Nothing about this or any other aspect of SORNA makes it an instance in which "essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause." *Comstock*, 130 S. Ct. at 1967-1968 (Kennedy, J., concurring in the judgment).

Nor, finally, do the challenged provisions of SORNA threaten to "work a substantial expansion of federal authority." *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.). As explained above, SORNA applies to only a narrow class of offenders, and its federal-offender-specific provisions cover an even more limited group. The statute's registration requirement is non-punitive; it relates directly to the nature of the offenders' federal convictions; and it requires those offenders only to provide the kind of information to States (and other jurisdictions) that those jurisdictions generally already require them to provide.

Under the circumstances, Section 2250(a)(2)(A) is a legitimate and narrow part of SORNA's comprehensive national framework for sex-offender registration and

is therefore supported by the Necessary and Proper Clause.

CONCLUSION

The judgment of the court of appeals should be vacated or reversed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 2250 provides in pertinent part:

Failure to register

(a) IN GENERAL.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) AFFIRMATIVE DEFENSE.—In a prosecution for a violation under subsection (a), it is an affirmative defense that—

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

* * * * *

2. 18 U.S.C. 4042 (2000, repealed in part in 2006) provides in pertinent part:

Duties of Bureau of Prisons

* * * * *

(c) NOTICE OF SEX OFFENDER RELEASE.—(1) In the case of a person described in paragraph (4) who is released from prison or sentenced to probation, notice shall be provided to—

(A) the chief law enforcement officer of the State and of the local jurisdiction in which the person will reside; and

(B) a State or local agency responsible for the receipt or maintenance of sex offender registration information in the State or local jurisdiction in which the person will reside.

The notice requirements under this subsection do not apply in relation to a person being protected under chapter 224.

(2) Notice provided under paragraph (1) shall include the information described in subsection (b)(2), the place where the person will reside, and the information that the person shall be subject to a registration requirement as a sex offender. For a person who is released from the custody of the Bureau of Prisons whose expected place of residence following release is known

to the Bureau of Prisons, notice shall be provided at least 5 days prior to release by the Director of the Bureau of Prisons. For a person who is sentenced to probation, notice shall be provided promptly by the probation officer responsible for the supervision of the person, or in a manner specified by the Director of the Administrative Office of the United States Courts. Notice concerning a subsequent change of residence by a person described in paragraph (4) during any period of probation, supervised release, or parole shall also be provided to the agencies and officers specified in paragraph (1) by the probation officer responsible for the supervision of the person, or in a manner specified by the Director of the Administrative Office of the United States Courts.

(3) The Director of the Bureau of Prisons shall inform a person described in paragraph (4) who is released from prison that the person shall be subject to a registration requirement as a sex offender in any State in which the person resides, is employed, carries on a vocation, or is a student (as such terms are defined for purposes of section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994), and the same information shall be provided to a person described in paragraph (4) who is sentenced to probation by the probation officer responsible for supervision of the person or in a manner specified by the Director of the Administrative Office of the United States Courts.

(4) A person is described in this paragraph if the person was convicted of any of the following offenses (including such an offense prosecuted pursuant to section 1152 or 1153):

(A) An offense under section 1201 involving a minor victim.

(B) An offense under chapter 109A.

(C) An offense under chapter 110.

(D) An offense under chapter 117.

(E) Any other offense designated by the Attorney General as a sexual offense for purposes of this subsection.

(5) The United States and its agencies, officers, and employees shall be immune from liability based on good faith conduct in carrying out this subsection and subsection (b).

(d) APPLICATION OF SECTION.—This section shall not apply to military or naval penal or correctional institutions or the persons confined therein.

3. 42 U.S.C. 14072 (2006, repealed effective 2009) provides in pertinent part:

FBI database

(a) Definitions

For purposes of this section—

(1) the term "FBI" means the Federal Bureau of Investigation;

(2) the terms "criminal offense against a victim who is a minor", "sexually violent offense", "sexually violent predator", "mental abnormality", "predatory", "employed, carries on a vocation", and "stu-

dent" have the same meanings as in section 14071(a)(3) of this title; and

(3) the term "minimally sufficient sexual offender registration program" means any State sexual offender registration program that—

(A) requires the registration of each offender who is convicted of an offense in a range of offenses specified by State law which is comparable to or exceeds that described in subparagraph (A) or (B) of section 14071(a)(1) of this title;

(B) participates in the national database established under subsection (b) of this section in conformity with guidelines issued by the Attorney General;

(C) provides for verification of address at least annually;[1]

(D) requires that each person who is required to register under subparagraph (A) shall do so for a period of not less than 10 years beginning on the date that such person was released from prison or placed on parole, supervised release, or probation.

(b) Establishment

The Attorney General shall establish a national database at the Federal Bureau of Investigation to track the whereabouts and movement of—

(1) each person who has been convicted of a criminal offense against a victim who is a minor;

---

[1] So in original. Probably should be followed by "and".

(2) each person who has been convicted of a sexually violent offense; and

(3) each person who is a sexually violent predator.

(c) Registration requirement

Each person described in subsection (b) of this section who resides in a State that has not established a minimally sufficient sexual offender registration program shall register a current address, fingerprints of that person, and a current photograph of that person with the FBI for inclusion in the database established under subsection (b) of this section for the time period specified under subsection (d) of this section.

* * * * *

(g) Notification of FBI of changes in residence

(1) Establishment of new residence

For purposes of this section, a person shall be deemed to have established a new residence during any period in which that person resides for not less than 10 days.

(2) Persons required to register with the FBI

Each establishment of a new residence, including the initial establishment of a residence immediately following release from prison, or placement on parole, supervised release, or probation, by a person required to register under subsection (c) of this section shall be reported to the FBI not later than 10 days after that person establishes a new residence.

(3) Individual registration requirement

A person required to register under subsection (c) of this section or under a State sexual offender offender[2] registration program, including a program established under section 14071 of this title, who changes address to a State other than the State in which the person resided at the time of the immediately preceding registration shall, not later than 10 days after that person establishes a new residence, register a current address, fingerprints, and photograph of that person, for inclusion in the appropriate database, with—

(A) the FBI; and

(B) the State in which the new residence is established.

(4) State registration requirement

Any time any State agency in a State with a minimally sufficient sexual offender registration program, including a program established under section 14071 of this title, is notified of a change of address by a person required to register under such program within or outside of such State, the State shall notify—

(A) the law enforcement officials of the jurisdiction to which, and the jurisdiction from which, the person has relocated; and

(B) the FBI.

---

[2] So in original.

(5) Verification

(A) Notification of local law enforcement officials

The FBI shall ensure that State and local law enforcement officials of the jurisdiction from which, and the State and local law enforcement officials of the jurisdiction to which, a person required to register under subsection (c) of this section relocates are notified of the new residence of such person.

(B) Notification of FBI

A State agency receiving notification under this subsection shall notify the FBI of the new residence of the offender.

(C) Verification

(i) State agencies

If a State agency cannot verify the address of or locate a person required to register with a minimally sufficient sexual offender registration program, including a program established under section 14071 of this title, the State shall immediately notify the FBI.

(ii) FBI

If the FBI cannot verify the address of or locate a person required to register under subsection (c) of this section or if the FBI receives notification from a State under clause (i), the FBI shall—

(I) classify the person as being in violation of the registration requirements of the national database; and

(II) add the name of the person to the National Crime Information Center Wanted person file and create a wanted persons record: *Provided*, That an arrest warrant which meets the requirements for entry into the file is issued in connection with the violation.

* * * * *

(i) Penalty

A person who is—

(1) required to register under paragraph (1), (2), or (3) of subsection (g) of this section and knowingly fails to comply with this section;

(2) required to register under a sexual offender registration program in the person's State of residence and knowingly fails to register in any other State in which the person is employed, carries on a vocation, or is a student;

(3) described in section 4042(c)(4) of title 18, and knowingly fails to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation; or

(4) sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105–119, and knowingly fails to register in any State in which the person resides, is employed, carries on a voca-

tion, or is a student following release from prison or sentencing to probation, shall, in the case of a first offense under this subsection, be imprisoned for not more than 1 year and, in the case of a second or subsequent offense under this subsection, be imprisoned for not more than 10 years.

* * * * *

4. 42 U.S.C. 16901 provides in pertinent part:

Declaration of purpose

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders:

* * * * *

5. 42 U.S.C. 16912 provides:

Registry requirements for jurisdictions

(a) Jurisdiction to maintain a registry

Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.

(b) Guidelines and regulations

The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.

6. 42 U.S.C. 16913 provides:

Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

7. 42 U.S.C. 16925 provides:

Failure of jurisdiction to comply

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).

(b) State constitutionality

(1) In general

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) Efforts

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

(3) Alternative procedures

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or

is in the process of implementing[1] reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

(4) Funding reduction

If a jurisdiction does not comply with paragraph (3), then the jurisdiction shall be subject to a funding reduction as specified in subsection (a) of this section.

(c) Reallocation

Amounts not allocated under a program referred to in this section to a jurisdiction for failure to substantially implement this subchapter shall be reallocated under that program to jurisdictions that have not failed to substantially implement this subchapter or may be reallocated to a jurisdiction from which they were withheld to be used solely for the purpose of implementing this subchapter.

(d) Rule of construction

The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.

8. Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, Tit. I, § 115(a)(8)(C), 111 Stat. 2466 provides:

(i) The Secretary of Defense shall specify categories of conduct punishable under the Uniform Code of Military Justice which encompass a range of conduct

[1] So in original. Probably should be followed by a comma.

comparable to that described in section 170101(a)(3)(A) and (B) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071(a)(3)(A) and (B)), and such other conduct as the Secretary deems appropriate for inclusion for purposes of this subparagraph.

(ii) In relation to persons sentenced by a court martial for conduct in the categories specified under clause (i), the Secretary shall prescribe procedures and implement a system to—

(I) provide notice concerning the release from confinement or sentencing of such persons;

(II) inform such persons concerning registration obligations; and

(III) track and ensure compliance with registration requirements by such persons during any period of parole, probation, or other conditional release or supervision related to the offense.

(iii) The procedures and requirements established by the Secretary under this subparagraph shall, to the maximum extent practicable, be consistent with those specified for Federal offenders under the amendments made by subparagraphs (A) and (B).

(iv) If a person within the scope of this subparagraph is confined in a facility under the control of the Bureau of Prisons at the time of release, the Bureau of Prisons shall provide notice of release and inform the person concerning registration obligations under the procedures specified in section 4042(c) of title 18, United States Code.

RESPONDENT'S BRIEF

RECORD AND BRIEFS

No. 12-418

MAR 27 2013
OFFICE OF THE CLERK

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ANTHONY JAMES KEBODEAUX,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT KEBODEAUX

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QUESTIONS PRESENTED

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), which imposes registration requirements on persons convicted of sex offenses under state or federal law. Both federal and state offenders are subject to criminal penalties if they cross state lines to avoid registration. A federal offender, however, may be punished even without interstate travel. Kebodeaux is a federal offender because of his 1999 military conviction for having consensual sex with a 15-year-old girl. In 2008, he was convicted under SORNA for a registration violation that occurred within the state of Texas – no interstate travel was involved. The Fifth Circuit Court of Appeals ruled that SORNA, as applied to Kebodeaux, was unconstitutional. The questions presented by the Government are:

1. Whether the court of appeals erred in conducting its constitutional analysis on the premise that Kebodeaux was not under a federal registration obligation until 2006, when SORNA was enacted.

2. Whether the court of appeals erred in holding that Congress lacked authority, under Article I of the Constitution, to provide for SORNA's criminal penalties, as applied to a person who was convicted of a federal sex offense and completed his criminal sentence before SORNA's enactment.

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BRIEF FOR RESPONDENT KEBODEAUX

Anthony Kebodeaux respectfully asks this Court to affirm the judgment of the court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Taxing, Commerce, Military, and Necessary and Proper Clauses quoted in the Government's Brief, at 2, Kebodeaux's case involves the Tenth Amendment to the U.S. Constitution, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. CONST. amend. X.

FEDERAL REGULATION INVOLVED

The Attorney General's regulation, 28 C.F.R. § 72.3, provides, in pertinent part:

> The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

STATEMENT OF THE CASE

In March 1999, Kebodeaux was a 20-year-old airman stationed at Peterson Air Force Base, in Colorado. (R. 200; Presentence Report (PSR) 1.) He began a consensual sexual relationship with a 15-year-old girl, who would sneak out of her home at night and take a cab to the base to be with him. (R. 200; PSR 6.)[1] This relationship led to charges that Kebodeaux had "carnal knowledge" of a "female under the age of 16," in violation of Article 120 of the Uniform Code of Military Justice, and that he disobeyed orders to have no contact with the girl and to remain on base. (Pet. App. 167a; R. 200; PSR 6-7.)

In special court-martial proceedings, Kebodeaux pleaded guilty to the charges. (R. 200-01.) The tribunal sentenced him to three months' confinement and a bad-conduct discharge on May 17, 1999. (R. 201.) Kebodeaux served his sentence in the Air Force Corrections System, was unconditionally released from custody, and returned to his home in Texas sometime before September 18, 1999. (Pet. App. 2a-3a; R. 201, 203; PSR 12.)

Kebodeaux's offense subjected him to registration as a sex offender under Texas law. The Sex Offender Registration and Notification Act (SORNA) became law on July 27, 2006. In 2008, nearly 10 years after

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[1] Kebodeaux's mother describes him as "bashful, insecure, and . . . slow to mature." (PSR Addendum) (Letter from Vivian Bailey to sentencing court Oct. 13, 2008.)

the carnal-knowledge offense, Kebodeaux was convicted under SORNA for failing to update his registration when he moved from El Paso to San Antonio. The Fifth Circuit Court of Appeals reversed that conviction "on narrow grounds," ruling that Kebodeaux's 1999 military conviction for a sex offense was an insufficient basis for federal jurisdiction. (Pet. App. 3a.)

1. ***Kebodeaux's Obligation to Register as a Sex Offender in Texas, and Pre-SORNA Registration Law.*** When Congress "initially set national standards" for sex-offender registration in 1994, it "did not include any federal criminal liability." *Carr v. United States*, 130 S. Ct. 2229, 2238 (2010); *see* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, tit. XVII, subtit. A, § 170101, 108 Stat. 2038, 2038-42 (1994) (codified at 42 U.S.C. § 14071 (1994)). Instead, Congress conditioned the receipt of federal funds on the States' adoption of specified registration and penalty provisions for sex offenders. *See* 42 U.S.C. § 14071(b), (c), (f). Enforcement of those provisions was left to the States. *See id.* § 14071(c); *Carr*, 130 S. Ct. at 2238 ("federal sex-offender registration laws have, from their inception, expressly relied on state-level enforcement").

Texas adopted sex-offender registration standards to comply with the Wetterling Act and subsequent amendments enacted through 1999. *See Creekmore v. Att'y Gen. of Tex.*, 341 F. Supp. 2d 648, 653-54 (E.D. Tex. 2004) (noting Texas's amendment of

its sex-offender registration program "to insure that the program met minimum federal requirements"). Under Texas law, Kebodeaux's carnal-knowledge offense subjected him to state registration requirements because the elements of his offense were similar to the Texas offenses of indecency with a child and sexual assault.[2]

Texas defined Kebodeaux's offense as a "sexually violent offense," because it involved a minor, and Kebodeaux was older than 17 when it occurred. TEX. CODE CRIM. PROC. ANN. art. 62.01(6)(E) (West Elec. Supp. 1999). That classification subjected Kebodeaux to lifetime registration as a sex offender. TEX. CODE CRIM. PROC. ANN. art. 62.12(a) (West Elec. Supp. 1999). He was required to verify his registration annually, and to notify authorities of his changes in residence. TEX. CODE CRIM. PROC. ANN. art. 62.06(a) (West Elec. Supp. 1999).[3] Violation of the Texas

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[2] Kebodeaux's conviction was a "reportable conviction," which triggered sex-offender registration, because it was a "conviction under . . . the Uniform Code of Military Justice" for an offense with elements substantially similar to the Texas offenses of indecency with a child and sexual assault. *See* TEX. CODE CRIM. PROC. ANN. arts. 62.01(5)(A), (J), 62.02 (sex-offender registration) (West Elec. Supp. 1999).

[3] The Texas Department of Public Safety (DPS) at one time required Kebodeaux to register every 90 days, apparently on the mistaken belief that Kebodeaux had two convictions for a sexually violent offense. *See* (R. 204-06) (listing Kebodeaux's "offense" as "sexual aslt child 2X/indecency"); TEX. CODE CRIM. PROC. ANN. art. 62.06(a) (requiring every-90-day registration for one "who has on two or more occasions been convicted of . . . a

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sex-offender registration requirements subjected Kebodeaux to imprisonment for two to 10 years. *See* TEX. CODE CRIM. PROC. ANN. arts. 62.06, 62.10(a), (b)(2) (West Elec. Supp. 1999) (together making Kebodeaux's failure to register a third-degree felony); TEX. PENAL CODE § 12.34(a) (West 2003) (third-degree felony punishable by two to 10 years' imprisonment).[4]

When Kebodeaux completed his sentence and was discharged from the Air Force, he apparently was not notified of his duty to register in Texas. A 1997 amendment to the Wetterling Act required military authorities to inform military sex offenders of their state registration obligations. Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, § 115(a)(8)(C)(ii)(II), 111 Stat. 2440, 2466. Military correctional facilities were slow to implement this directive. *See* Office of the Inspector General, Dep't of

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sexually violent offense") (West Elec. Supp. 1998). The DPS may have been misled because the special court-martial order finding Kebodeaux guilty listed two dates on which he "commit[ted] the offense of carnal knowledge[.]" (R. 200.) Both dates were contained in a single charge, however, and Kebodeaux sustained a single conviction. (R. 200; PSR 5.) The error apparently has been corrected, as current DPS registry information on Kebodeaux correctly notes that he is subject to annual registration. *See* Texas Sex Offender Registry, https://records.txdps.state.tx.us/SexOffender/PublicSite/Application/Search/Individual.aspx?IND_IDN=6843376 (last visited March 13, 2013).

[4] The Government's brief notes a higher statutory maximum. Gov't Br. 46-47. That, however, is based on the DPS's apparent misclassification of Kebodeaux's single carnal-knowledge conviction. *See supra* note 3.

Def., EVALUATION OF DOD CORRECTIONAL FACILITY COMPLIANCE WITH MILITARY SEX OFFENDER NOTIFICATION REQUIREMENTS, REPORT NO. CIPO2002S003 (June 26, 2002) (OIG report). The Department of Defense only "began issuing policy to implement the Wetterling Act" and its amendments on September 28, 1999—after Kebodeaux had been released. OIG Report 5 (citing DoD Directive 1325.4 (Sept. 28, 1999)). The policy simply directed the Secretaries of the Military Departments to establish policies and procedures to comply with 42 U.S.C. § 14071's notification requirements. DoD Directive 1325.4, § 5.3.8 (Sept. 28, 1999). In December 1999, the Defense Department published a list of military offenses that triggered the military's duty to notify offenders of state registration obligations, and promulgated procedures to provide for such notice. DoD Instruction 1325.7, §§ 6.18.5, 6.18.6, Enclosure 27 (Dec. 17, 1999).[5]

Although Kebodeaux apparently was not notified of his duty to register, he did register in Texas, in 2004. *See* Texas Sex Offender Registry, https://records.txdps.state.tx.us/SexOffender/PublicSite/Application/Search/Individual.aspx?IND_IDN=6843376 (last visited

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[5] A "directive-type memorandum," dated December 23, 1998, also listed the covered offenses. (Pet. App. 171a-76a.) The memorandum was subject to a requirement that a Department of Defense "Directive or Instruction incorporating the substance of [the] memorandum . . . issue[ ] within 90 days." (*Id.* at 174a.)

March 13, 2013). The record does not reveal what prompted that registration.

Wetterling Act amendments created a penalty for federal and military sex offenders who failed to comply with State registration requirements where they resided, were employed, or attended school, following release. *See* 1998 Appropriations Act § 115(a)(2)(F), (a)(6)(C), 111 Stat. at 2463, 2464, 2467 (effective Nov. 26, 1997) (codified at 42 U.S.C. §§ 14071(b)(7), 14072(i) (Supp. III 1997)), § 115(a)(8)(A), (a)(8)(C), 111 Stat. 2464-65, 2466-67 (effective Nov. 26, 1998) (codified at 10 U.S.C. § 951, note, 18 U.S.C. § 4042 (Supp. III 1997)), § 115(c); Department of Justice Appropriations Act, 1999, Pub. L. No. 105-277, div. A, § 101(b) [tit. I, § 123(3)], 112 Stat. 2681-50, 2681-73 (Oct. 21, 1998) (codified at 42 U.S.C. § 14072(i)(3), (4) (Supp. IV 1998)). The penalty also applied to persons subject to federal registration requirements. *See* 42 U.S.C. §§ 14071(c), 14072(c), (g)(3), (i)(1), (i)(2) (Supp. IV 1998). Failure to register was punishable by imprisonment up to one year, in the case of a first offense, and up to 10 years for a subsequent offense. *Id.* § 14072(i).

2. ***SORNA.*** Congress enacted SORNA as part of the Adam Walsh Child Protection and Safety Act of 2006. *See* Pub. L. No. 109-248, tit. I, 120 Stat. 587, 590-611. Like the Wetterling Act, SORNA required States to adopt national standards for sex-offender registration or forfeit ten percent of certain federal criminal justice funds. Unlike the Wetterling Act, SORNA directly made registration a federal requirement for all sex offenders and created a federal criminal

offense to punish those who violate the requirements. *See* 18 U.S.C. § 2250 (2006); 42 U.S.C. § 16913 (2006); Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8895 (Feb. 28, 2007) (SORNA "directly imposes registration obligations on sex offenders as a matter of federal law and provides for federal enforcement of these obligations"). The initial deadline for States to comply with SORNA was July 27, 2009. 42 U.S.C. § 16924(a) (2006). Because no State had substantially implemented SORNA by then, the Attorney General extended the compliance deadline for another two years. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-211, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT 2, 9 n.12 (Feb. 2013) (GAO Report). As of February 2013, only 16 states had substantially implemented SORNA's requirements. *See id.* 13.

SORNA dictates that "[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). The criminal punishment provision for failure to register states:

> § 2250. Failure to register
>
> (a) In general.—Whoever—
>
> (1) is required to register under the Sex Offender Registration and Notification Act;

> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act; shall be fined under this title or imprisoned not more than 10 years, or both.

Section 2250(a) applies to those "required to register" under SORNA. Those required to register are sex offenders. 42 U.S.C. § 16913(a). A "sex offender" is anyone who has been "convicted of a sex offense[,]" under state, local, tribal, federal, military, and some foreign law provisions. *Id.* § 16911(1), (5)(A), (5)(B), (6). According to the Attorney General, SORNA's federal-offender provisions are "within the constitutional authority of the Federal Government" because "conviction for a federal sex offense [is] the basis for registration[.]" 72 Fed. Reg. at 8895.

Congress delegated to the Attorney General the authority to determine whether and when SORNA

would apply to offenders like Kebodeaux, who were convicted of a sex offense before SORNA's enactment. 42 U.S.C. § 16913(d); *Reynolds v. United States*, 132 S. Ct. 975, 978 (2012). The Attorney General waited seven months to exercise that authority. On February 28, 2007, he issued an immediately effective interim rule that purported to make SORNA applicable to all sex offenders, including those convicted before July 27, 2006, when SORNA became law. *See* 72 Fed. Reg. at 8894-95, 8897 (codified at 28 C.F.R. § 72.3 (2007)). This regulation was promulgated without notice and comment, and without publication of the final rule 30 days before its effective date, as required by the Administrative Procedures Act (APA). *See* 72 Fed. Reg. at 8894-95, 8896-97; 5 U.S.C. § 553(b), (c) (requiring notice and comment), (d) (requiring 30 days' advanced publication) (2006). The Attorney General relied on the APA's "good cause" exceptions to excuse compliance with these requirements, and stated that public comments on the already-effective rule would be accepted through April 30, 2007. 72 Fed. Reg. at 8895, 8896-97 (citing 5 U.S.C. § 553(b)(3)(B), (d)(3)).[6]

On May 30, 2007, the Attorney General issued proposed guidelines to implement SORNA. The

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[6] *See* 5 U.S.C. § 553(b)(3)(B) (advance notice excused "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest"); 5 U.S.C. § 553(d)(3) (30-day advance publication inapplicable "as otherwise provided by the agency for good cause found and published with the rule").

National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30,210 (May 30, 2007). The guidelines reiterated that SORNA applied to pre-enactment sex offenders. *Id.* at 30,212, 30,228-29. Comments on the guidelines were to be accepted through August 1, 2007. 72 Fed. Reg. at 30,210. Final guidelines, including the final retroactivity rule, were published on July 2, 2008, and purported to become effective immediately. 73 Fed. Reg. 38,030, 38,046-47 (July 2, 2008).

3. *Kebodeaux's SORNA conviction.* In August 2007, Kebodeaux updated his registration as a sex offender pursuant to Texas law when he moved from San Antonio to El Paso to be with his long-time girlfriend. (Pet. App. 167a-68a; PSR 3.) He returned to San Antonio shortly afterward. (Pet. App. 168a-69a; PSR 3.) Kebodeaux did not inform the El Paso Police Department of his departure, and he did not register with San Antonio authorities upon his return. *(Id.)* As Kebodeaux later explained, "under normal circumstances," he would have updated his registration. (R. 265.) Because he was devastated over the break-up with his girlfriend, however, Kebodeaux "didn't care about [his] life," tried "to commit suicide," and neglected his registration obligations. (R. 265-66; PSR 3.)

Kebodeaux was arrested in San Antonio on March 12, 2008. (Pet. App. 169a.) A federal grand jury in El Paso indicted him for failing to register and to update registration, as required by SORNA. The indictment alleged that Kebodeaux was a sex offender

because of his military conviction, and that he violated SORNA's requirements from August 14, 2007, until March 12, 2008, in the Western District of Texas. Kebodeaux's motion to dismiss the indictment on constitutional and statutory grounds was denied. (Pet. App. 114a-65a; R. 48-74.) After a bench trial on stipulated facts, the district court convicted Kebodeaux of failing to register, as required by SORNA, and sentenced him to one year and one day of imprisonment, to be followed by five years' supervised release. (Pet. App. 2a-3a, 166a-69a; R. 200-06, 257, 273.)[7]

4. ***Kebodeaux's Appeal.*** Kebodeaux appealed, challenging the constitutionality of his conviction. After a panel of the Fifth Circuit rejected that challenge, the court decided to hear the case en banc. Kebodeaux argued that neither the Constitution's Military, Commerce, nor Necessary and Proper Clauses justified the application of SORNA to his intrastate failure to update his registration. Kebodeaux's Supplemental Brief on Rehearing En Banc at 10-36 (Aug. 16, 2011). The Government contended that SORNA's application to Kebodeaux was necessary and proper to its "authority to enact

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[7] In 2010, Kebodeaux's supervised release was revoked in an agreed order. The revocation involved no sexual offense or misconduct. Order at 1-2, *United States v. Kebodeaux*, No. 5:10-CR-117 (W.D. Tex. Sept. 30, 2010), ECF No. 19. The court sentenced him to 17 months' imprisonment and terminated his supervised release. *Id.* at 3.

laws for the responsible operation of a federal penal system" and under the Commerce Clause. En Banc Brief of the United States at 13-14 (Sept. 7, 2011).[8]

The en banc court ruled that SORNA was unconstitutional as applied to Kebodeaux, "under the specific and limited facts of this case[.]" (Pet. App. 2a.) Kebodeaux had "served his sentence and . . . been unconditionally released from prison and the military" in 1999—years before SORNA's enactment. (*Id.* at 2a-3a.)[9] In these circumstances, Congress lacked a "jurisdictional hook" to subject Kebodeaux to SORNA's provisions governing the failure to register after intrastate travel. (*Id.* at 3a.) The Fifth Circuit's "finding of unconstitutionality . . . d[id] not affect the registration requirements for . . . any federal sex offender who was in prison or on supervised release when the statute was enacted in 2006 or . . . any federal sex offender convicted since then." (*Id.* at 4a.) Neither did it affect any offender—state or federal—who crosses state lines and then fails to register. (*Id.*

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[8] In the courts below, the Government did not rely on the spending power, the Property Clause, or 42 U.S.C. § 14072(i)(4), all of which it relies upon before this Court. *See* Gov't Br. 15, 17, 20, 22-26 & n.9, 28, 32 n.14, 49, 51-52.

[9] Under the Fifth Circuit's ruling in *United States v. Johnson*, those, like Kebodeaux, who failed to register after March 30, 2007, are subject to the Attorney General's regulation making SORNA applicable to offenders convicted before its passage. *See* Pet. App. at 2a n.1 (citing *Johnson*, 632 F.3d 912, 931-32 (5th Cir. 2011). The court decided that SORNA applied to Kebodeaux under this precedent. *Id.* at 3a n.1.

at 42a (former federal offenders may still be "regulated just as state sex offenders currently are under federal law")).

The Fifth Circuit relied on *United States v. Comstock*, 130 S. Ct. 1949 (2010). (Pet. App. 6a-24a.) *Comstock* upheld the constitutionality of 18 U.S.C. § 4248, which permits the civil commitment of inmates "currently 'in the custody of the [Federal] Bureau of Prisons,'" beyond the date they would otherwise be released, if they are mentally ill and sexually dangerous. 130 S. Ct. at 1954 (alteration in *Comstock*). Unlike the federal inmates in *Comstock*, Kebodeaux's federal sentence had expired, and he had been "unconditionally released from prison and the military." (Pet. App. 3a.) Kebodeaux was not "in prison or on supervised release[.]" (*Id.* at 4a.) Neither was he subject to federal sex-offender registration requirements as "a condition of [his] release from prison[.]" (*Id.* at. 11a.)[10] In these circumstances, the court ruled, the Federal Government lacks authority to "reassert jurisdiction over someone it had long ago

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[10] In a footnote, the court rejected dissenting Judge Haynes's argument that Kebodeaux had "been subject to federal registration ever since his 1999 conviction." (Pet. App. 4a n.4.) That argument overlooked "a fundamental difference between SORNA and its predecessors." (*Id.*) While "SORNA directly imposes a registration requirement on covered sex offenders," pre-SORNA law subjected only certain sex offenders to federal registration. (*Id.*) Those residing in states that were not minimally compliant were subject to a federal registration obligation, but Kebodeaux was not in that class of offenders. (*Id.* at 4a-5a n.4.)

unconditionally released from custody just because he once committed a federal crime." (*Id.*); *see also* (*id.* at 16a n.28 (noting Government's concession in *Comstock* that it lacks power to commit a person who "'has been released from prison and whose period of supervised release is also completed'").)

The Fifth Circuit also rejected the Government's "alternative argument" that SORNA's registration and penalty provisions are "necessary and proper to effect Congress's Commerce Clause power." (Pet. App. 24a-25a.) The court concluded that neither the federal power to regulate the channels of interstate commerce; nor the instrumentalities of interstate commerce, and persons or things in interstate commerce; nor activities that substantially affect interstate commerce, supported SORNA's application to Kebodeaux. (*Id.* at 24a-41a.)

In sum, the Fifth Circuit held that SORNA's "registration requirements" and its "criminal penalties for failing to register after intrastate relocation are unconstitutional solely as they apply to former federal sex offenders who had been unconditionally released from federal custody before SORNA's passage in 2006." (Pet. App. 41a.) As to these offenders, SORNA "is an unlawful expansion of federal power at the expense of the traditional and well-recognized police power of the state." (*Id.* at 42a.)

SUMMARY OF THE ARGUMENTS

I. The Fifth Circuit Correctly Determined That the Federal Government Lacked Authority to Create and Enforce National Sex-Offender Registration Requirements, as They Applied to Kebodeaux, Whose Military Sentence Expired in 1999.

SORNA's federal-offender provisions, as applied to Kebodeaux, exceed Congress's authority. Kebodeaux's sentence for a military sex offense expired in 1999, seven years before SORNA's passage, and he resumed life as a private citizen in Texas. Nearly 10 years later, the Federal Government prosecuted him for an intrastate violation of SORNA's provisions. The Fifth Circuit Court of Appeals correctly ruled that, in these circumstances, SORNA was an unlawful expansion of federal authority, at the expense of the States' traditional police power.

A. Through its enactment of SORNA, the Federal Government legislated in an area traditionally reserved to the States. Sex-offender registration programs exist in all 50 States; they represent an exercise of the regulatory authority that is an incident of the States' general power of governing. The Federal Government's intrusion into this area is a significant factor signaling SORNA's unconstitutionality, as applied to Kebodeaux.

B. In *United States v. Comstock*, 130 S. Ct. 1949 (2010), this Court considered whether the Federal Government could detain sexually dangerous inmates

currently in federal custody beyond the date they would otherwise have been released. *Comstock* upheld the detention statute, relying on Congress's powers to create and punish crimes, the fact that the inmates were in custody, and that the Federal Government helped to create the danger posed by the inmates' release. As applied to Kebodeaux, SORNA goes beyond the limits established in *Comstock*. It permits the Federal Government to reach back, after a federal sentence has expired, to impose sex-offender registration and penalty provisions. The five considerations this Court found important in *Comstock* show that such reaching back exceeds Congress's authority.

C. Parts of SORNA are supported by the spending and commerce powers, and the powers over federal property and the Indian Tribes. None of those powers individually authorizes SORNA's federal-offender provisions, as applied to Kebodeaux. The Government proposes bundling these powers, coupling the bundle with the Necessary and Proper Clause, and declaring that the result is a permissible and comprehensive national sex-offender-registration program. The problem with this novel approach is that the Necessary and Proper Clause cannot create a federal power as the Government proposes. It can only help execute enumerated powers, and the Government has not identified any that apply here.

D. The Fifth Circuit's constitutional analysis of SORNA's federal-offender provisions is sound. The Government attempts to vitiate that analysis by arguing that the court was mistaken to say that

federal jurisdiction over Kebodeaux ended when he was released from custody in 1999. It is the Government that is mistaken. Kebodeaux's release from federal custody was unconditional, and upon release he returned to the State's power. The existence of a federal penalty provision for failure to register in a State in 1999 did not subject Kebodeaux to continuous federal jurisdiction, as the Government claims. In any event, the penalty provisions cited by the Government did not apply to Kebodeaux.

II. The Fifth Circuit's Judgment May Be Affirmed on the Alternate Ground That Kebodeaux's Failure to Register Occurred Before SORNA Applied to Him.

This Court can avoid deciding the constitutional issue presented in Kebodeaux's case by finding that SORNA did not apply to him. Kebodeaux's failure-to-register offense ended in March 2008. The Attorney General did not promulgate a valid regulation applying SORNA to pre-enactment offenders like Kebodeaux until the summer of 2008. The effective date of the regulation presents an issue that has divided the courts of appeals. The Government argues that the Court ought not rule on the issue because it was not preserved on appeal. That overlooks the Court's authority to affirm on any ground, even one not argued in the appeals court. Consonant with that authority and the doctrine of constitutional avoidance,

the Court should consider the effective-date issue raised by Kebodeaux, and affirm on that ground.

ARGUMENTS

I. The Fifth Circuit Correctly Determined That the Federal Government Lacked Authority to Create and Enforce National Sex-Offender Registration Requirements, as They Applied to Kebodeaux, Whose Military Sentence Expired in 1999.

The "general power of governing," commonly known as the "'police power'" belongs to the States—not to the Federal Government. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (*NFIB*); *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring) ("Residual power, sometimes referred to . . . as the police power, belongs to the States and the States alone."). That power, "'in the ordinary course of affairs, concern[s] the lives, liberties, and properties of the people[.]'" *NFIB*, 132 S. Ct. at 2578 (quoting THE FEDERALIST NO. 45, at 293 (J. Madison) (Clinton Rossiter ed., 1961)). The Federal Government also has authority to govern, but only pursuant to the powers enumerated in the Constitution. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

SORNA's registration and penalty provisions for former federal offenders regulate the everyday lives and liberties of the people, albeit a particular class of people, by requiring them to register and punishing them for failure to do so. That exercise of authority does not fall within any of the Federal Government's enumerated powers. The Constitution does not permit this exercise of federal power over a person who satisfied his federal sentence, returned to the authority of the State, and did not travel interstate.

A. By Enacting SORNA, the Federal Government Entered an Area in which State Authority Is at Its Zenith, and Where the States Have Robustly Exercised Their Authority.

Kebodeaux challenges federal-offender provisions only as they apply to him and others like him. The degree to which SORNA's federal-offender provisions intrude into areas traditionally reserved to the States is a significant consideration in determining whether the law is unconstitutional, as applied to Kebodeaux. "It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause; if so, that is a factor suggesting that the power is not one properly within the reach of federal power." *Comstock*, 130 S. Ct. at 1967-68 (Kennedy, J., concurring). In enacting SORNA's federal-offender provisions, Congress compromised essential attributes of State sovereignty.

SORNA's registration requirements are an intrusive form of federal regulation. A person convicted of a sex offense must "register, and keep the registration current, in each jurisdiction where" he lives, works, or attends school. 42 U.S.C. § 16913(a) (2006). The person must report a wide variety of personal information, including his name, Social Security number, residence address and telephone numbers, the name and address of any place where he is or will be an employee, the name and address of any place where he is or will be a student, the license plate number and a description of any vehicle he owns or operates, and information about his travel plans when he leaves home for seven or more days. 42 U.S.C. § 16914(a)(1)-(7) (2006); The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,055-57 (July 2, 2008).[11]

"SORNA lists 22 categories of information sex offenders must provide at registration, and many of these categories have subcategories." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-211, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT 15 (Feb. 2013) (GAO Report). The offender must appear in person to report changes in the required information within three days after a "change of name, residence, employment, or student status[.]" 42 U.S.C. § 16913(c). Periodic in-person verification also is required—every

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[11] Section 16914(a) and excerpts from the Guidelines are reproduced in Appendix A.

three months for an offender designated as a "tier III" offender, every six months for a "tier II" offender, and annually for a "tier I" offender. 42 U.S.C. § 16916 (2006). These registration provisions "regulate individuals as such," making SORNA an exercise of the police power that properly "remains vested in the States." *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.).

State and local governments were the first to enact sex-offender registration laws, beginning with California in 1947. *See* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 30 (Stanford University Press 2009). Over the years, other States followed suit. *Id.* at 30-32. In the early 1990s, highly publicized accounts of crimes against children led additional States to adopt registration laws. *Id.* at 49-55. By 1996, all 50 States had adopted sex-offender registration laws. *Smith v. Doe*, 538 U.S. 84, 89-90 (2003). As this Court has recognized, such provisions are an exercise of the general "'regulatory power'" that is "'an incident of the State's power to protect the health and safety of its citizens[.]'" *Id.* at 93-94 (quoting *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)).

SORNA's registration and penalty provisions thus intrude on the "ordinary processes and powers of the States." *See Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring); *see also United States v. Lopez*, 514 U.S. 549, 565 (1995) ("States historically have been sovereign" in "criminal law enforcement"). This

intrusion into an area in which State authority is paramount, and where States have robustly exercised their power, is a significant factor signaling SORNA's unconstitutionality, as applied to Kebodeaux.

B. Under the Analysis in *Comstock*, SORNA Is Neither Necessary Nor Proper to Execute the Enumerated Powers Supporting Federal Sex Offenses.

The Government contends that SORNA's federal-offender provisions are necessary and proper to accomplish a legitimate end under Congress's enumerated constitutional powers—the national registration of sex offenders. Gov't Br. 29-48. Much of the Government's argument relies on this Court's reasoning in *Comstock*. *Id.* 31-33, 36-48. Its contentions fail because of the critical distinctions between that case and Kebodeaux's.

In *Comstock*, this Court considered a constitutional challenge to a "civil-commitment statute" that authorized the Federal Government "to detain a mentally ill, sexually dangerous federal prisoner beyond the date [he] would otherwise be released." 130 S. Ct. at 1954. The statute permitted this exercise of federal power only if the State would not accept responsibility for a prisoner whose federal sentence was about to expire. *Id.* at 1954-55, 1960-61. The States' reluctance to accept such prisoners was fueled by "the Federal Government itself," which had

"severed [the inmates'] claim to 'legal residence in any State,' by incarcerating them in remote federal prisons." *Id.* at 1961.

"Congress' desire to address" the States' reluctance to accept responsibility for sexually dangerous federal inmates, the Court ruled, "taken together with its responsibilities as a federal custodian, . . . satisfie[d] the Constitution's insistence that a federal statute represent a rational means for implementing a constitutional grant of legislative authority." *Id.* at 1962. The Court explained that, in this narrow context, § 4248 was "'reasonably adapted' . . . to Congress' power to act as a responsible federal custodian" for inmates who would pose a danger if released without a State's agreement to accept responsibility for them. *Id.* at 1961 (citation omitted). The custodial role, which was necessary to execute the enumerated powers underlying federal crimes, was also necessary to avert a danger that the Federal Government had helped to create.

No comparable link exists between SORNA's federal-offender provisions and the enumerated powers that support the creation of federal sex crimes. The link suggested by the Government is that the underlying offense is "federal," and the offense "itself creates the risks addressed by sex-offender registration." Gov't Br. 34. The Federal Government, however, played no part in creating that risk, and this case does not involve the difficult issues posed by the potential release of dangerous individuals from federal custody. To the extent that federal sex

offenders should be monitored, the States have not abdicated their public-safety function; they have uniformly assumed responsibility for post-sentence monitoring. *See* Wayne A. Logan, *Sex Offender Registration and Community Notification: Past, Present, and Future*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 6 (2008) (all 50 states had sex-offender registration laws by 1996).[12] In these circumstances, the Federal Government has no power to exercise continued authority over Kebodeaux simply because he committed a military sex offense in 1999.

In *Comstock*, this Court relied on "five considerations, taken together[,]" to conclude that the commitment statute was necessary and proper to the exercise of enumerated powers that supported the creation of federal criminal offenses. 130 S. Ct. at 1956. Acknowledging that SORNA "goes a step further than" the statute approved in *Comstock*, the Government contends that, nonetheless, *Comstock*'s five considerations support SORNA's registration requirement for federal offenders whose sentences had expired before its enactment. Gov't Br. 36. The factors considered in *Comstock* lead to the opposite conclusion. The Necessary and Proper Clause does not permit Congress to subject persons to SORNA solely because they were once convicted of a federal crime.

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[12] Appendix C contains an index of State laws that require federal and military sex offenders to register.

1. *The breadth of the Necessary and Proper Clause does not support SORNA's application to Kebodeaux.*

The Necessary and Proper Clause provides the Federal Government with broad authority to execute the powers enumerated in Article I, Section 8, of the Constitution. *Comstock*, 130 S. Ct. at 1956. This authority is not without limits; the clause "does not give Congress *carte blanche*." *Id.* at 1970 (Alito, J., concurring). Any exercise of this power must be both "necessary" and "proper."

To determine whether the statute at issue was "necessary" to carry out an enumerated power, the *Comstock* Court looked to see whether it "constitute[d] a means that is rationally related to the implementation of a constitutionally enumerated power." *Id.* at 1956 (majority opinion). SORNA's federal-offender provisions, as applied to Kebodeaux, are not "necessary" because they are not rationally related to the implementation of an enumerated power. To be rationally related, a law must have "a tangible link" to an enumerated power—"a demonstrated link in fact, based on empirical demonstration"—"not a mere conceivable rational relation[.]" *Id.* at 1967 (Kennedy, J., concurring). "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17

U.S. (4 Wheat.) 316, 421 (1819). SORNA's regulatory ends are not within the scope of the Constitution.

The Government finds the required rational relationship in "the judgment of Congress," as well as in the "corroborating judgment of States[,]" which enacted similar laws before SORNA's passage. Gov't Br. 37. The "concurrence of multiple governmental actors about the soundness of an approach," it contends, "can provide additional confidence in its rationality." Gov't Br. 38.[13] The Government's reliance on the States' actions, as support for the rationality of Congress's choice of means in SORNA, rests on the unspoken assumption that what the States may do, the Federal Government may do. That is incorrect. The powers of the "'State governments are numerous and indefinite[,]'" while the powers of "'the federal government are few and defined.'" *Lopez*, 514 U.S. at 552 (quoting The Federalist no. 45, at 292-93 (Clinton Rossiter ed., 1961)).

The States may enact sex-offender registration and penalty provisions because they have a general

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[13] There is debate about whether sex-offender registration systems are reasonably adapted to address the purportedly higher recidivism rate of sex offenders. *See* Gov't Br. 38 n.19. A report submitted to the Department of Justice in November 2012 concluded that the tiering systems already in use by the states performed better than SORNA's tiering system in predicting recidivism. *See* KRISTEN M. ZGOBA ET AL., A MULTI-STATE RECIDIVISM STUDY USING STATIC-99R AND STATIC-2002 RISK SCORES AND TIER GUIDELINES FROM THE ADAM WALSH ACT 23, 29 (Nov. 2012).

police power—such provisions are "an incident of the State's power to protect the health and safety of its citizens[.]" *Doe*, 538 U.S. at 93 (internal quotation marks and citation omitted). Registration and penalty provisions are reasonably adapted to carry out that general police power. But the Federal Government does not have a police power. *Comstock*, 130 S. Ct. at 1967 (police power "belongs to the States and the States alone") (Kennedy, J., concurring). For SORNA's federal-offender provisions to be valid, they must be reasonably adapted to the execution of the enumerated powers that created, and provided punishment for, Kebodeaux's underlying offense. They are not—the underlying crime was identified, prosecuted, and punished long ago. SORNA in no way helps to execute the military power that allowed that 1999 prosecution, or the custodial power that served to carry out the punishment for it.

The Government next relies on this Court's observation, in *Carr v. United States*, that "it was 'entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders—persons who typically would have spent time under federal criminal supervision.'" Gov't Br. 34 (quoting 130 S. Ct. 2229, 2238 (2010)); *see also id.* 16, 18, 52. The Court's remark rejected the Government's contention that Carr's proffered statutory interpretation was faulty because it resulted in anomalous and differing treatment for federal and state sex offenders. 130 S. Ct. at 2238. The Court

opined that Congress intended to treat the two classes of offenders differently by assigning the Federal Government a special role with respect to federal offenders. *See id.*

The Government acknowledges that *Carr*'s comment addressed an issue of statutory construction and referred to Congress's likely intent in enacting SORNA's federal-offender provisions. Gov't Br. 34-35 & n.16. Still, it asserts that the Court's observation "has equal force in [the] constitutional analysis[,]" because "[i]t is difficult to see how the Court's conclusion about what is 'entirely reasonable' could be true for purposes of determining what Congress intended to do but not for purposes of determining what Congress was permitted to do." Gov't Br. 35 & n.16. This simply does not follow. The Court's reasoning on a question of statutory construction cannot be taken out of context to resolve a constitutional question that the Court never considered. *See In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("[T]his Court does not decide important questions of law by cursory dicta inserted in unrelated cases.").

SORNA's federal-offender provisions, as applied to Kebodeaux, lack the required rational relationship to "a constitutionally enumerated power." *Comstock*, 130 S. Ct. at 1956. Accordingly, they are not "necessary" to execute the powers that permit the creation of federal sex offenses. Nor are they "proper," because they compromise an essential attribute of State sovereignty—the States' power to make and enforce laws that regulate the everyday conduct of their

citizens. *See NFIB*, 132 S. Ct. at 2578 (police power "'concern[s] the lives [and] liberties . . . of the people'"). A law "that undermine[s] the structure of government established by the Constitution" is "not *proper*" because it is "not 'consist[ent] with the letter and spirit of the constitution[.]'" *Id.* at 2592 (opinion of Roberts, C.J.) (quoting *Printz v. United States*, 521 U.S. 898, 924 (1997), and *McCulloch*, 17 U.S. (4 Wheat.) at 421).

Once Kebodeaux completed his military sentence and was discharged from the military, Texas resumed authority over him. *See Comstock*, 130 S. Ct. at 1965 (federal power expires once inmate "'has been released from prison and [his] period of supervised release is also completed'") (quoting Transcript of Oral Argument at 9). Texas, not the Federal Government, had exclusive authority to decide how and whether Kebodeaux should register as a sex offender and whether to punish him if he failed to register.

2. *The scant historical precedent for federal registration of sex offenders suggests SORNA's unconstitutionality.*

While "a longstanding history of . . . federal action" in a particular area "does not demonstrate a statute's constitutionality[,]" such a history can help to establish "the reasonableness of the relation between the new statute and pre-existing federal interests." *Comstock*, 130 S. Ct. at 1958. The civil-commitment statute considered in *Comstock* was "a

modest addition to a set of federal prison-related mental-health statutes that ha[d] existed for many decades." *Id.* The Federal Government had "been involved in the delivery of mental health care to federal prisoners" since 1855. *Id.* And civil-commitment statutes similar to § 4248 had been enacted in 1949, and again in 1984. *Id.* at 1960.

SORNA's provisions have no such history. The Federal Government first legislated in this area in 1994, by providing inducements to the States to exercise their police power. *See* Wetterling Act, Pub. L. No. 103-322, tit. XVII, § 170101, 108 Stat. 2038-42. Subsequent legislation created limited registration and penalty provisions. *See Carr*, 130 S. Ct. at 2238-39 & n.7. In 2006, SORNA directly imposed registration requirements on all sex offenders, and created a federal criminal penalty for failure to observe those requirements. *See* 18 U.S.C. § 2250 (2006); 42 U.S.C. § 16913. These additions were not modest, and they did not rest on longstanding precedent. "[S]ometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." *NFIB*, 132 S. Ct. at 2586 (opinion of Roberts, C.J.) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3159 (2010)) (alterations in *NFIB*); *see also Virginia Office for Prot. and Advocacy v. Stewart*, 131 S. Ct. 1632, 1641 (2011).

Perhaps realizing the constitutional infirmity suggested by SORNA's lack of historical precedent, the Government contends that SORNA "is built on"

the history of federal probation, parole, and supervised release provisions, which regulate offenders under sentence but not in prison. Gov't Br. 39. There is a crucial difference between SORNA and these "post-release supervision" programs. Gov't Br. 39. Probation, supervised release, and parole are monitoring programs that are part of a criminal sentence. *See* 18 U.S.C. § 3551(b) (2006) ("term of probation" is a sentence); *id.* § 3583(a) (2006) ("supervised release" imposed "as a part of the sentence"); *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) ("parole is an established variation on imprisonment of convicted criminals"); *cf. Johnson v. United States*, 529 U.S. 694, 700 (2000) ("postrevocation sanctions [are] part of the penalty for the initial offense"). Sex-offender reporting requirements, however, are not part of the punishment for a crime. *See Doe*, 538 U.S. at 101-02.

The Government dismisses this distinction, arguing that "*Comstock* rejected the dissent's analysis that the relationship between the federal government and a federal prisoner ends when 'criminal jurisdiction over [the] prisoner ends.'" Gov't Br. 40 (quoting *Comstock*, 130 S. Ct. at 1979 & n.12 (Thomas, J., dissenting)). Kebodeaux disagrees. *Comstock* did not suggest that the Federal Government's relationship with its prisoners permitted the exercise of federal power even after a criminal sentence expires. Instead, the Court found it necessary and proper to extend the federal power, when the Federal Government itself, through its prison system, helped to create a danger to the public. The Government's role as custodian of a

sexually dangerous prisoner permitted continued authority over him, so long as the authority was first exercised before his sentence expired. *Comstock* was careful to acknowledge that federal power ceased to exist over an offender who "'has been released from prison and whose period of supervised release is also completed.'" 130 S. Ct. at 1965 (quoting Transcript of Oral Argument at 9).

The history of post-release supervision of federal offenders, imposed as part of a sentence, does not supply historical precedent for federal sex-offender registration and penalty provisions. As applied to Kebodeaux, SORNA's provisions reasserted federal control over an offender after his sentence was complete, and he had returned to the responsibility and control of the State. "[O]nce 'the transfer to State responsibility and State control has occurred[,]'" the Federal Government no longer has any "'appropriate role'" in monitoring the conduct of a former federal inmate. *Id.*

3. *SORNA's registration and punishment provisions are not a reasonable extension of federal authority, as applied to Kebodeaux, who completed his federal sentence before SORNA's enactment.*

The Government contends that SORNA is a "reasonable extension of preexisting federal post-release regulation of sex offenders," relying on the same faulty analogy it relies upon in analyzing the

second *Comstock* factor. Gov't Br. 41. Its analogy fails here as well.

Sentence-based, post-release regulation—through probation, parole, and supervised release—executes the enumerated powers that permit Congress to create federal crimes precisely because it is part of the sentence. Reaching backward to regulate an offender whose sentence has expired, as SORNA's application to Kebodeaux does here, is not a reasonable extension of a sentence-based regulation. The Government conceded as much in *Comstock*. *See* 130 S. Ct. at 1965.

The Government now argues its concession "pertained to the limits on the government's 'power to commit a person.'" Gov't Br. 42. SORNA's provisions, it contends, represent "a significantly more modest assertion of power." *Id*. But the Government's position in *Comstock* was that it lacked power, once the federal sentence expired, because "at that point the State police power over a person has been fully reestablished"—not because of the restrictive nature of the commitment statute. *See* Transcript of Oral Argument at 9, *Comstock*, 130 S. Ct. 1949. When asked whether "the Federal Government [could] order a commitment of anyone who's been in Federal custody over the last 10 years[,]" the Government's response was clear:

> [SOLICITOR GENERAL]: . . . I would say that that would be a different case and that the Federal Government would not have . . . the power to commit a person who . . . has

> been released from prison and whose period of supervised release is also completed. At that point the release has been—the transfer to State responsibility and State control has occurred, and the Federal Government would have no appropriate role.

Id. at 8-9. The Court then inquired further:

> [THE COURT]: So that must be because there is a lack of Federal power.
>
> [SOLICITOR GENERAL]: Yes, I think that that's correct, that at that point the State police power over a person has been fully reestablished.

Id. at 9. The State police power over Kebodeaux was reestablished when he was unconditionally released from custody and the military in September 1999. The Necessary and Proper Clause could not create federal power to require Kebodeaux to register in 2006, or to permit his federal prosecution in 2008.

Nor is the Government correct that SORNA's assertion of federal power is "significantly more modest" than that of § 4248. Gov't Br. 42. SORNA imposes burdensome and long-lasting registration obligations. *See* 42 U.S.C. §§ 16913, 16914(a), 16915(a). Those requirements have "caused difficulties in sex offenders' ability to reintegrate into the community[,]" including problems obtaining housing and finding work, factors that may increase, rather than decrease, offenders' rates of recidivism. GAO Report 23, 31.

In addition, SORNA's registration requirements are imposed without the safeguards that attend § 4248 proceedings. A person committed under § 4248 has access to "a system for ongoing psychiatric and judicial review of the individual's case, including judicial hearings at the request of the confined person at six-month intervals." *Comstock*, 130 S. Ct. at 1955. That hearing may result in discharge. *See* 18 U.S.C. § 4247(h) (2006). By contrast, under SORNA, a tier III offender must register for life, with no relief from registration unless he committed the sex offense when he was a juvenile. 42 U.S.C. § 16915(a)(3). In that case, registration may terminate after 25 years. § 16915(b)(2)(B). A tier II offender must register for 25 years, with no relief from registration, and a tier I offender must register for 10 years before he may apply for relief. § 16915(a)(2), (b)(2).

SORNA's federal-offender penalty provision, 18 U.S.C. § 2250(a)(2)(A), is an additional assertion of federal power that is far from "modest," as illustrated by Kebodeaux's case. Kebodeaux has been registered in Texas as a sex offender since 2004. *See supra* 6. During a difficult period in his life, he failed to update his registration, and was prosecuted by the Federal Government—not Texas. (R. 265-66; PSR 3.) He served a prison sentence for that lapse, as a result of the exercise of federal power. Given the circumstances of Kebodeaux's 1999 offense, the limited punishment he received for it, and his apparent record of substantial compliance with Texas law, it is not surprising that the State, a "government[ ] more

local and more accountable than a distant federal bureaucracy," did not prosecute him. *See NFIB*, 132 S. Ct. at 2578; *see also Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) ("The federal system rests on" the premise "that 'freedom is enhanced by the creation of two governments, not one.'") (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)).

4. *SORNA fails to accommodate States' interests.*

Section 4248 did not improperly compromise state sovereignty in part because it "require[d] *accommodation* of state interests[.]" *Comstock*, 130 S. Ct. at 1962. Under § 4248, the Federal Government was required to notify the prisoner's home state of his federal detention, and to release the prisoner to the State if it agreed to assume custody of him. *Id.* No similar accommodation exists under SORNA; it authorizes federal registration and punishment regardless of State interests.

This is starkly illustrated by the fact that Kebodeaux's home state has rejected the Federal Government's judgment—expressed in SORNA—about how an intrastate sex-offender registration system should operate. In a letter to the Department of Justice, explaining why Texas had not complied with SORNA, the General Counsel for the Governor's Office explained: " . . . the adoption of [SORNA's] 'one-size-fits-all' federal legislation in Texas would in fact undermine the accomplishment of [SORNA's]

objectives in Texas, just as it would in most other states."[14] Other states have made similar decisions. Indeed, as noted, only 16 states have substantially implemented SORNA since its enactment. GAO Report 13.

The States, of course, may decline to adopt SORNA's requirements, as the GAO report shows many have. But they lack the power to prevent federal prosecution of a former federal offender's intrastate failure to register. The Government asserts that States can prevent such enforcement, noting that "[s]ection 2250's criminal penalties cannot be enforced if a State is unwilling to register the offender." Gov't Br. 53. On this theory, the State must forfeit its own sovereign interest in regulating sex offenders living within its borders to prevent enforcement of federal sex-offender laws.

States do not want to abandon sex-offender registration; they simply endorse different standards from those dictated by the Federal Government in

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[14] Letter from Jeffrey S. Boyd, General Counsel and Acting Chief of Staff, Texas Office of the Governor, to Linda Baldwin, Director, SMART Office (Aug. 17, 2011); *see also* Letter from Risa S. Sugarman, Director, New York Office of Sex Offender Management, to Linda Baldwin, Director, SMART Office (Aug. 23, 2011) ("[W]e are convinced that the statutory scheme set out by our legislature is in the best interests of New York State and the best way to protect our citizens."). The letters are reproduced in Appendix B, and are available at http://www.ncleg.net/documentsites/committees/JLOCJPS/October%2013,%202011%20Meeting/RD_SORNA_General_Information_2011-10-13.pdf .

SORNA. For example, Texas has determined that annual in-person registration is sufficient for a person who has a single sex-offense conviction. TEX. CODE CRIM. PROC. ANN. art. 62.058(a) (West 2006). SORNA can require more frequent reporting, based on its tier system for classifying prior convictions. *See* 42 U.S.C. §§ 16911(2)-(4), 16916 (2006). That system itself has been a source of disagreement between the States and the Federal Government. *See* GAO Report 19; Appendix B. Texas, like other States, favors risk assessments over the federal tier system, which determines registration requirements based on the offense of conviction. *See id.*; TEX. SENATE COMM. ON CRIMINAL JUSTICE, INTERIM REPORT TO THE 82D LEGISLATURE at 4, 19 (2011), *available at* http://www.senate.state.tx.us/75r/senate/commit/c590/c590.Interim Report 81.pdf (last visited Mar. 24, 2013).

SORNA compromises, rather than accommodates, States' interests in sex-offender registration. Kebodeaux's failure to register as a sex offender when he moved intrastate was inherently local in nature, and it should have been left to local authorities to address.

5. *The link between SORNA and an Article I, § 8 enumerated power is too attenuated.*

Under the final *Comstock* factor, the link between the challenged federal legislation "and an enumerated Article I power" must not be "too attenuated." 130

S. Ct. at 1963. Section 4248's link to federal power was not too attenuated because that provision's "narrow scope" was "limited to individuals already 'in the custody of the' Federal Government." *Id.* at 1964, 1965 (quoting § 4248(a)). Here, the Federal Government has asserted the power to reach back to regulate a former offender, who had been discharged from the military and released from prison when his sentence expired. Because this power is too attenuated from any Article I power, the fifth *Comstock* consideration weighs against SORNA's constitutionality as applied to Kebodeaux.

C. The Federal Authority Exercised in SORNA Is Not Necessary and Proper to Execute the Multiple Enumerated Powers Relied Upon by the Government.

Recognizing the weakness of its reliance below on *Comstock* and the Commerce Clause, the Government raises a new theory in this Court. SORNA's federal-offender provision is constitutional because it is a focused and rational component of a comprehensive national framework for sex-offender registration. Gov't Br. 48-54. The Government relies on no single enumerated power as authority for this argument. Instead, it contends that SORNA is necessary and proper to effectuate "multiple enumerated powers" that, individually, support some of SORNA's provisions. *See* Gov't Br. 48-49.

The "Spending Clause authority," the Government contends, supports Congress's withholding of federal funds to encourage States to comply with SORNA. *Id.* at 49. The Commerce Clause, now demoted to a minor role in the Government's advocacy, supports SORNA's provisions that punish interstate travel to evade registration requirements. *See id.* at 50-51. The Property Clause supports SORNA's application in federally controlled lands. *Id.* at 51. Finally, the "various sources" of the Federal Government's power over Indian tribes supports SORNA's application to those tribes. *Id.*[15] SORNA's federal-offender provisions, the Government argues, are "necessary and proper to help effectuate . . . a comprehensive national registration system" for sex offenders that is the "legitimate end" served by all of the cited powers. *Id.* at 51.

The Government's argument illustrates that the "Necessary and Proper Clause" is "the last, best hope of those who defend ultra vires congressional action[.]" *Printz*, 521 U.S. at 923. Like the Government's other arguments, its conglomeration-of-powers theory ignores the line between State and Federal sovereignty. Perhaps most important, it "license[s] the exercise of a[ ] 'great substantive and independent power[ ]' beyond those specifically enumerated" in the

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[15] As the Government concedes, it did not rely on the federal spending authority—itself implied from the power to tax—in the courts below. *See* Pet. 24 n.8. For the first time here, it relies on the Property Clause and its powers over Indian Tribes.

Constitution. *NFIB*, 132 S. Ct. at 2591 (opinion of Roberts, C.J.) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411, 421).

1. *None of the individual enumerated powers relied upon by the government support SORNA's application to Kebodeaux.*

The Government does not explicitly argue that the spending power authorizes SORNA's application to Kebodeaux. Instead, it asserts that "Congress reasonably concluded" that SORNA's provisions "were an appropriate means of ensuring that the federal funds it invested in creating and enforcing a comprehensive national sex-offender-registration system were well spent." Gov't Br. 52. The Government cites no Congressional findings, or even legislative history, to support this questionable assertion.[16] The Government does cite *Sabri v. United States*, 541 U.S. 600 (2004), in support of this claim, Gov't Br. 52, but its reliance is misplaced.

Sabri was a case about money and its fungibility. A businessman offered bribes to an official employed by a city agency that received federal funds. 541 U.S. at 602-03. The Court found that the Spending and Necessary and Proper Clauses permitted the creation

[16] There is one citation to a House Report, for the proposition that Congress identified a trend of sex offenders failing to comply with existing registration laws. *See* Gov't Br. 52.

of the federal bribery statute under which Sabri was convicted "to safeguard the integrity of the . . . recipients of federal dollars[,]" so that "taxpayer dollars . . . are not frittered away in graft[.]" *Id.* at 605 (discussing 18 U.S.C. § 666). A bribery prosecution aimed at protecting the integrity of federal funds disbursed under the spending power is rationally related to the power to spend for the general welfare.

A criminal prosecution under SORNA for an intrastate failure to register is not related to the power to spend for the general welfare. That Congress may protect the money it spends from theft or diversion is a far different proposition from the claim that it may pass laws regulating purely local conduct of individuals to achieve what it believes to be a desirable policy end, such as a "comprehensive" sex-offender registration scheme. The Federal Government does not gain the power to regulate the lives of private citizens under the Necessary and Proper Clause merely because it provides money to the States in which they reside. The Necessary and Proper "[C]lause is not itself a grant of power[.]" *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960). The Government's suggestion that *Sabri* permits it to impose the federal-offender registration requirements and the intrastate penalties on Kebodeaux must therefore fail.

Unlike the bribery statute considered in *Sabri*, SORNA is not aimed at protecting federal money. It is more like the program considered in *South Dakota v. Dole*, 483 U.S. 203 (1987). South Dakota faced a loss

of federal highway funds unless it raised the State's drinking age to 21. *Id.* at 205. Lack of uniformity in the States' drinking ages threatened highway safety —a main goal of the highway funds—because there was an incentive for young people to travel by car to neighboring states where the drinking age was lower. *Id.* at 208-09. Using federal funds to induce the States to act in a way that created national uniformity in the drinking age was a proper use of the spending power. *Id.* at 211-12.

That the inducement to the State was proper did not allow the Federal Government to regulate intrastate activities of citizens otherwise outside its powers. For instance, the spending power inducement could not grant the national government power to prosecute underage, intrastate drunk drivers. Yet, under the Government's theory, federal prosecution of these drivers would be proper under the spending power as a desirable, comprehensive way of ensuring that federal highway safety funds were well spent. So attenuated a theory—whether applied to an underage drunk driver or to a sex offender who fails to register intrastate—is too far removed from the spending power to pass constitutional muster.

The Government takes the same indirect approach with the Commerce Clause as it does with the spending power. It does not argue that SORNA's application to Kebodeaux is necessary and proper to execute the Commerce Clause power. *See* Gov't Br. 48-51. It simply points out that the Commerce Clause supports SORNA's penalty provision for an offender

who travels in interstate commerce to evade his registration obligations. Gov't Br. 51.[17] Because Kebodeaux failed to register intrastate—no crossing of state lines was involved—the Commerce Clause does not support SORNA's application to him.

The Government mentions additional enumerated powers to suggest that SORNA's application to Kebodeaux is constitutional—the power to regulate federal property and the power over Indian affairs. Gov't Br. 51. These powers have no relation to Kebodeaux, or to SORNA's application to him.

2. *Bundling enumerated powers together does not create a new power that supports SORNA's application to Kebodeaux.*

The Government invokes the spending, commerce, property, and Indian powers to argue that SORNA's penalty provision is necessary and proper to help effectuate "a comprehensive national registration system," various parts of which are supported by those powers individually. Gov't Br. 51-52. To support that argument, the Government cites the concurring opinion in *Gonzales v. Raich*, which says that "Congress may regulate even noneconomic local activity if

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[17] In the Fifth Circuit, the Government argued extensively that the Commerce Clause supported SORNA's application to Kebodeaux. *See* En Banc Brief of the United States at 29-41. It apparently has abandoned the argument in this Court.

that regulation is a necessary part of a more general regulation of interstate commerce." Gov't Br. 51-52 (quoting 545 U.S. 1, 37 (2005) (Scalia, J., concurring)). It does not explain how that proposition applies here.

That is unsurprising, as it has no application. The "power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market[.]" 545 U.S. at 38 (Scalia, J., concurring). The registration and punishment of sex offenders cannot, in any sense, be considered the "regulation of an interstate market[.]" *See id.* There is no market, interstate or otherwise, involved here.

3. *The Federal Government lacks a general police power that would permit it to enact "a comprehensive national framework" for sex-offender registration.*

In the Government's view, federal authority over former federal offenders is helpful to the States and "attest[s] to [the Federal Government's] willingness to work cooperatively with the states and to shoulder some of the burden of implementing SORNA[.]" Gov't Br. 52-53. The Federal Government's desire to shoulder some of the burden for implementing SORNA is admirable, and it may do so by exercising its enumerated powers. It may provide federal funds to the States, on condition that they substantially implement SORNA. It may assist the States by federally

prosecuting those who cross state lines to evade registration requirements. And it has independent authority to enforce SORNA on federal property and through its powers over the Indian tribes—there are no competing States' interests there.

What the Federal Government may not do is take over the registration and punishment of federal sex offenders convicted and released before SORNA's enactment, who do not cross state lines. Those offenders returned to the State's authority when their federal sentences expired. Concepts of federalism that protect individual liberty and State sovereignty forbid that extra reach.

D. The Government's Attempt to Vitiate the Fifth Circuit's Constitutional Analysis Fails.

The Fifth Circuit's constitutional analysis is sound. Under the principles articulated in *Comstock*, and well-recognized concepts of federalism, the court correctly concluded that the reassertion of federal jurisdiction over Kebodeaux, through SORNA's enactment, was an unlawful expansion of federal power at the expense of State sovereignty. (Pet. App. 42a.)

The Government attempts to undermine the Fifth Circuit's constitutional analysis, arguing that the court made a threshold error about federal jurisdiction over Kebodeaux in 1999, when his sentence expired and he was discharged from the Air Force. Gov't Br. 18, 27. The court ruled that SORNA was

unconstitutional, as applied to Kebodeaux, in part because he had been unconditionally released from federal custody before SORNA's 2006 enactment. (Pet. App. 41a.) The Government contends that Kebodeaux had not been unconditionally released—instead, he had been "*continuously*" under federal jurisdiction because he "was continuously subject to a federal criminal penalty for knowingly failing to register as a sex offender." Gov't Br. 19.

This argument has multiple flaws. First, the Government takes "unconditional release" to mean release free from a federal registration requirement. Gov't Br. 9-10, 19. Second, it equates the existence of "a potential federal criminal penalty for failure to register" Gov't Br. 20, with a "federal registration requirement[.]" Gov't Br. 25. Third, it relies on federal penalty provisions that did not apply to Kebodeaux. For these reasons, the Government is mistaken.

1. *Kebodeaux was unconditionally released from federal custody in 1999.*

The Fifth Circuit correctly concluded that, in 1999, Kebodeaux had been "unconditionally released from prison and the military." (Pet. App. 3a.) The Government's argument to the contrary misunderstands the court's view of what it means for an offender to be unconditionally released. In the Fifth Circuit's view, Kebodeaux had been unconditionally released in 1999 because "[h]e was no longer in

federal custody, in the military, under any sort of supervised release or parole, or in any other special relationship with the federal government[.]" (Pet. App. 2a.) The court stated this proposition several times. It observed that Kebodeaux "fully served [his] sentence, and the federal government severed all ties with him." (Pet. App. 2a.) By 2006, when SORNA was enacted, Kebodeaux had been "long free from federal custody or supervision." (Pet. App. 12a); *see* (Pet. App. 24a ("no longer subject to federal custody or supervision").) He was "*someone who was once in prison but seven years ago had fully served his sentence and has not since been in contact with the federal government.*" (Pet. App. 15a.) Sex-offender registration requirements "were not a condition of Kebodeaux's release from prison[.]" (Pet. App. 11a.) For that reason, Kebodeaux was unlike those who "are in custody or have been released from custody on the condition that they comply with SORNA." (Pet. App. 18a.)

Assuming Kebodeaux was subject to a federal registration requirement in 1999—and Kebodeaux disputes that —the requirement was not a condition of his release. Kebodeaux was not set free on condition that he comply with a federal registration requirement any more than he was set free on condition that he not commit murder. Any registration requirement that may have existed in 1999 imposed a new obligation—it was not a condition of his release. The Fifth Circuit's reasoning relies on Kebodeaux's release free from conditions, not the absence of a federal registration requirement. That is why the

court addressed the issue of a purportedly extant federal registration requirement only in a footnote, and only to respond to the dissenters' complaint that the existence of a registration requirement meant that Kebodeaux was not released unconditionally. *See* (Pet. App. 4a n.4.)

As the Fifth Circuit recognized, current registration requirements, under SORNA, are a condition of a sex offender's release from custody. (Pet. App. 13a & n.23, 18a & n.32.) As of 2006, registration is a condition of a federal offender's release—either as a statutory requirement, or because the sentencing court adds it as a condition of supervised release. *See* 18 U.S.C. §§ 3553(a), 3583(d) (2006). Indeed, the court explicitly contrasted Kebodeaux with the defendant in *United States v. George*,[18] whose "compliance with [registration provisions] was an explicit condition of his sentence." (Pet. App. 24a n.37.) Kebodeaux was not subject to supervised release, or any other type of federal supervision in 1999; he was unconditionally released, as the court of appeals correctly found.

The Government's view is that release can be unconditional only if no federal requirement to register as a sex offender exists at the time of release, and it builds its analysis on that premise. *See* Gov't Br. 19-27. That was not the Fifth Circuit's view. Because the Government improperly equates "unconditional

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[18] 625 F.3d 1124, 1130 (9th Cir. 2010), *vacated on other grounds*, 672 F.3d 1126 (9th Cir. 2012).

release" with release free from a registration requirement, its argument fails.[19]

2. *Pre-SORNA law did not impose a federal registration requirement on Kebodeaux when he was released in 1999.*

The Government effectively concedes that pre-SORNA federal law did not impose a federal registration requirement upon Kebodeaux's 1999 release from custody. Instead, Kebodeaux was subject to "a potential federal criminal penalty" if he failed to register as required by State law. Gov't Br. 20. According to the Government, however, a "federal law that imposes federal criminal sanctions for failure to register is a 'federal registration requirement' under any reasonable understanding of that phrase." Gov't Br. 26. A possible future federal criminal penalty is not the same as a federal registration requirement.

The plain language of the statute the Government relies upon, 42 U.S.C. § 14072, distinguishes between a penalty and a registration requirement.

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[19] The Government is also mistaken in its assertion that the Fifth Circuit "recognized . . . that Congress [has] . . . constitutional authority to require registration" of offenders in custody or under supervision when a registration requirement is enacted. Gov't Br. 28 (citing Pet. App. 42a). The court simply said that such offenders are "unaffected" by its narrow ruling. (Pet. App. 42a.) The court did not decide whether such action was constitutional.

Section 14072 set out two registration requirements: (1) the "[r]egistration requirement" in subsection (c) stated that a sex offender "*shall register* . . . with the FBI" if he "resides in a State that has not established a minimally sufficient sexual offender registration program[;]" and (2) the "[i]ndividual registration requirement" under subsection (g)(3) stated that an offender who "change[d] address to a State other than the State in which [he] resided at the time of the immediately preceding registration *shall* . . . *register* a current address . . . with . . . the FBI[.]" 42 U.S.C. § 14072(c), (g)(3) (Supp. IV 1998) (emphasis added). Those are registration requirements. They provide that an individual "shall register."

Another provision imposed a penalty for offenders who were "required to register"—those who lived in a non-compliant state, or who changed residence to a State other than that in which the immediately preceding registration occurred. *See* 42 U.S.C. § 14072(i)(1). The penalty also applied to persons "required to register" under 42 U.S.C. § 14071(c)—those registered in one State, who worked or attended school in another. *See* 42 U.S.C. §§ 14071(c) (Supp. IV 1998), 14072(i)(2).[20] These provisions, which the Government has never claimed applied to Kebodeaux,

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[20] Subsection (i)(2) does not reference § 14071(c), but that latter provision requires a person registered in his State of residence to also register in the State where he works or attends school—the same class of persons who were subject to a penalty under 42 U.S.C. § 14072(i)(2).

actually "required" persons to register under federal law.

By contrast, the plain language of the provisions relied upon by the Government imposed only a penalty. Gov't Br. 20-27. Section 14072(i)(3) imposed a penalty on an offender "described in" 18 U.S.C. § 4042(c)(4), who "fails to register in any State" where the person lives, works, or attends school. Gov't Br. App. 9a. Subsection (i)(4) provides the same for an offender "sentenced by a court martial for conduct in a category specified by the Secretary of Defense[.]" Gov't Br. App. 9a-10a.

These provisions imposed a penalty; they did not impose a federal registration requirement. Under the plain language of the statute, the Fifth Circuit majority was correct.[21] Kebodeaux was not "subject to federal registration" when he was released in 1999. (Pet. App. 4a n.4.)

Conceptually, a requirement to register and a penalty for failing to register are different. A registration requirement imposes an immediate and affirmative duty to act. The person subject to that duty must take the action required, by virtue of the authority asserted. A penalty provision that punishes a failure

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[21] *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("[I]n any case of statutory construction, our analysis begins with the language of statute. And where the statutory language provides a clear answer, it ends there as well.") (internal quotation marks and citations omitted).

to act does not take effect unless and until that failure actually occurs and a prosecution is initiated. No jurisdiction is asserted until then.

This difference is important for the point the Government urges. It argues that SORNA did not reassert jurisdiction over Kebodeaux because he "was continuously subject to a federal criminal penalty" for failing to register, as required by State law. Gov't Br. 19. According to the Government, the existence of that penalty means that the Federal Government "*continuously* asserts jurisdiction over such offenders." *Id.*; *see also id.* 26 (because "federal criminal sanctions" existed "Congress did not relinquish federal authority over" Kebodeaux). But, because a penalty provision may never apply, its existence does not represent an exercise of continuous jurisdiction. If it did, the Federal Government would have continuous jurisdiction over everyone, as it may punish anyone who violates a federal criminal law. If the penalty provisions in § 14072(i)(3) or (4) applied to Kebodeaux, they did not subject him to continuous federal jurisdiction of the sort considered in *Comstock*, or contemplated by the Government here.

3. *The federal penalty provisions relied upon by the Government did not apply to Kebodeaux.*

The Government argues that Kebodeaux was subject to 42 U.S.C. § 14072(i)(3) and (i)(4), which imposed penalties on two categories of persons. Gov't

Br. 20-25. They included persons who were "described in section 4042(c)(4) of title 18," or who were "sentenced by a court martial for conduct in a category specified by the Secretary of Defense under section 115(a)(8)(C) of title I of Public Law 105-109[.]" § 14072(i)(3), (i)(4). Kebodeaux fit neither category.

First, Kebodeaux was not a person "described in section 4042(c)(4) of title 18[.]" § 14072(i)(3). Subject to § 4042(d), the persons described in subsection (c)(4) were those who had been convicted of specified federal sex offenses, including an "offense designated by the Attorney General as a sexual offense[.]" 18 U.S.C. § 4042(c)(4)(E) (Supp. III 1997). Kebodeaux's carnal-knowledge offense was one of the offenses designated by the Attorney General. But Kebodeaux was not included in the class of offenders described in section 4042(c)(4) because of the limitation in § 4042(d), which states that § 4042 "shall not apply to military or naval penal or correctional institutions or the persons confined therein." § 4042(d). Because Kebodeaux served his sentence in a military correctional institution, he was not a person "described in section 4042(c)(4) of title 18[.]" § 14072(i)(3).

The Government disputes subsection (d)'s explicit limitation on the reach of § 4042, arguing that it "merely means that Section 4042's substantive directions to BOP personnel . . . were immaterial to [Kebodeaux] while he was in military custody." Gov't Br. 22. That is not what subsection (d) says. It dictates that "[t]his section," which includes subsection (c)(4), "shall not apply to military or naval penal or

correctional institutions or the persons confined therein." § 4042(d). Kebodeaux was a person confined in a military correctional institution. Accordingly, he was not a person described in subsection (c)(4).[22]

Second, the Government has failed to show that the other penalty provision it relies upon, § 14072(i)(4), applied to Kebodeaux when he was released. That provision applied to "[a] person who is . . . sentenced by a court martial for conduct in a category specified by the Secretary of Defense under Section 115(a)(8)(C) of title I of Public Law 105-119[.]" The Secretary of Defense had not specified the offenses, as the law required, by the time Kebodeaux was released on September 18, 1999. Instead, an "Acting Assistant Secretary" specified the military carnal-knowledge offense as one subject to § 14072(i)(4) in a directive-type memorandum issued on December 23, 1998.

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[22] There is another problem with former § 14072(i)(3). Congress delegated to the Attorney General the authority to designate an offense a "sexual offense" for purposes of section 4042(c)(4). *See* 1998 Appropriations Act, Pub. L. No. 105-119, § 115(a)(8)(A), 111 Stat. 2240, 2465 (Nov. 26, 2007). The Attorney General, in turn, delegated that authority to the director of the Bureau of Prisons. *See* Designation of Offenses Subject to Sex-Offender Release Notification, 63 Fed. Reg. 69,386 (Dec. 16, 1998) (codified at 28 C.F.R. § 571.71 (2012)). The Director, finding good cause, dispensed with the APA's notice and comment requirements, and issued an immediately effective interim rule designating the offense of carnal knowledge as a "sexual offense" for purposes of § 4042(c)(4). *Id.*; 28 C.F.R. § 571.72(b)(2). That rulemaking is likely invalid for many of the same reasons cited in Part II, *infra*.

(Pet. App. 171a-76a.) According to the Government, the Acting Assistant Secretary was "exercising delegated authority," but no delegation has been cited by the Government, nor does one appear in the record. Gov't Br. 23. Absent a valid delegation, the directive-type memorandum does not meet the statutory requirement that the Secretary of Defense specify offenses.

Even if the Acting Assistant Secretary's directive-type memorandum was valid, it was effective for only 90 days. By its terms, the memorandum provided that "a DoD Directive or Instruction incorporating the substance of this memorandum shall be issued within 90 days[,]" but there is nothing in the record to show that this requirement was met. (Pet. App. 174a.)[23] To the contrary, the Defense Department's Inspector General has found that the Department of Defense only "began issuing policy to implement" Wetterling Act amendments on September 28, 1999—after Kebodeaux's release from custody and discharge from the Air Force. OIG Report 5 (citing DoD Directive 1325.4). The Directive referenced by the Inspector General did not include the list of covered military

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[23] Current Department of Defense policy provides that a directive-type memorandum (DTM) is "effective for no more than 6 months from the date signed, unless an extension is approved[.]" DoD Instruction 5025.01, at 2, 19, 31 (Sept. 26, 2012). Within that period, the DTM must be reissued as a DoD Directive, Instruction, Administrative Instruction, or Manual, or cancelled. *Id.* at 19. In 1999, a DTM required reissuance within 90 days. *See* DoD Directive 5025.1, at 3 (June 24, 1994).

offenses—the list required to trigger § 14072(i)(4)'s application. *See* DoD Directive 1325.4 (Sept. 28, 1999).

The record fails to show that, at the time Kebodeaux was released from custody and discharged from the military, the Secretary of Defense had validly designated military offenses as required to trigger § 14072(i)(4)'s penalty provision. Accordingly, the Government is incorrect that Kebodeaux was subject to the penalty in subsection (i)(4).

II. The Fifth Circuit's Judgment May Be Affirmed on the Alternate Ground That Kebodeaux's Failure to Register Occurred Before SORNA Applied to Him.

The Fifth Circuit correctly ruled that Kebodeaux's conviction should be reversed because Congress lacked the power to require him to register and to prosecute his intrastate failure to register. This Court, however, can avoid deciding the constitutional question and affirm the judgment below on the alternative ground that Kebodeaux was not covered by SORNA.

Pre-enactment offenders, such as Kebodeaux, were not made subject to SORNA by statute. Instead, Congress left it to the Attorney General to specify, by regulation, whether and when SORNA would apply to them. *Reynolds v. United States*, 132 S. Ct. 975 (2012) (interpreting 42 U.S.C. § 16913(d)). The Attorney General did not promulgate a valid regulation applying SORNA to pre-enactment offenders until the

summer of 2008, after Kebodeaux's failure to register. Because there was no valid regulation, SORNA's registration requirement did not apply to him.

The Government suggests that the Court cannot affirm on this ground because Kebodeaux failed to "preserve" it. Gov't Br. 7-8 n.3. This ignores that the Court may consider issues not raised in the court of appeals. *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980). Deciding the case on this ground accords both with this Court's longstanding precedent that a respondent "may urge any ground in support of the judgment," regardless whether it "was relied upon or even considered by the court below[,]" *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984), and with its "deeply rooted" practice "'not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979) (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). "[T]he traditional practice of this Court" is to decline to "decide constitutional questions when the record discloses other grounds of decision, whether or not they have been properly raised . . . by the parties." *Neese* v. *Southern R. Co.*, 350 U.S. 77, 78 (1955).

Affirming on this basis will not only resolve Kebodeaux's case, it will resolve the division among the circuits about when SORNA's registration requirements became applicable to pre-enactment offenders. *Compare United States v. Stevenson*, 676 F.3d 557, 565-66 (6th Cir.) (regulation effective August 1, 2008), *cert. denied*, 133 S. Ct. 168 (2012), *with*

United States v. Gould, 568 F.3d 459, 469-70 (4th Cir. 2009) (regulation effective February 28, 2007). Resolving the effective-date issue will eliminate the well-developed circuit split and will leave for another day the constitutional question raised by SORNA's application to pre-enactment offenders.

The circuits' disagreement over the effective date, though pronounced, is fairly easy to resolve. All agree the Attorney General promulgated an interim rule on February 28, 2007, that purported to make SORNA immediately applicable to pre-enactment offenders. 72 Fed. Reg. 8894 (codified at 28 C.F.R. § 72.3). All agree that the Attorney General bypassed the notice-and-comment period required by the APA, 5 U.S.C. § 553 (2006). All agree that the Attorney General claimed good cause for avoiding notice and comment, *see* 5 U.S.C. § 553(b)(3)(B), and good cause for making the regulation immediately effective, *see* 5 U.S.C. § 553(d)(3). All agree on the reasons he gave for his claims. *See* 72 Fed. Reg. 8896-99. Finally, all agree that the Attorney General waited seven months before issuing his immediately effective regulation. *See, e.g., United States v. Valverde*, 628 F.3d 1159, 1166 (9th Cir. 2010) (noting delay between enactment of SORNA and supposedly emergency regulation).

The question that remains is whether the Attorney General's reasons constituted good cause for bypassing the APA. They did not. Good cause is evaluated on a "case by case [basis], sensitive to the totality of the factors at play." *Valverde*, 628 F.3d at 1164. Agencies bear a heavy burden when they seek

to justify an invocation of the good-cause exception, for it is "narrowly construed and only reluctantly countenanced." *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (quoting *State of New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)). The good-cause exception "is essentially an emergency procedure" that should be invoked only when "delay would do real harm." *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) (internal quotation marks and citation omitted). At all other times, Congress's preference for the "traditional, deliberative rulemaking process" must be respected. *United States v. Johnson*, 632 F.3d 912, 928-29 (5th Cir. 2011). To do otherwise would be to "provid[e] agencies with an escape clause" whenever the agency "finds it inconvenient to follow [the statutory requirements]." *Id.* (internal quotation marks and citations omitted).

The Attorney General claimed that immediate action was needed to clear up uncertainty about SORNA's application and to speed up registration to protect public safety. 72 Fed. Reg. at 8896-99. Neither justification constituted good cause. Neither required emergency action. Congress had expressed no need for quick action. Quite the opposite. It gave the States three years to consider whether to accept and implement SORNA. It chose not to decide whether SORNA would apply to pre-enactment offenders, leaving that decision to the Attorney General. It could have directed immediate action or suspended the APA's requirements, but it did not. *See, e.g., Asiana Airlines v. F.A.A.*, 134 F.3d 393, 397-98 (D.C. Cir. 1998) (discussing

such congressional directions). Nor did the Attorney General conduct himself in a way that suggested that time was actually, as opposed to rhetorically, of the essence. He waited seven months before promulgating the purportedly urgent interim rule, a period that would have allowed for several notice-and-comment cycles. *Valverde*, 628 F.3d at 1166. Because there was no urgency, the Attorney General's good-cause claims must fail.

The first asserted justification fails for more than lack of urgency. The immediately effective rule was not, contrary to the Attorney General's claim, "necessary to eliminate any possible uncertainty about the applicability of the Act's requirements." 72 Fed. Reg. at 8896. Mere guidance is not good cause for avoiding APA-required procedures. *Johnson*, 632 F.3d at 929. If it were, then an agency's view that its pronouncement clarified a matter would swallow the exception. *Valverde*, 628 F.3d at 1166. Additionally, the Attorney General's promulgation of an interim rule, which implied that the final rule could be different, may actually have increased, rather than diminished uncertainty. *United States v. Reynolds*, No. 08-4747, 2013 WL 979058, at *8 (3d Cir. Mar. 14, 2013). The Attorney General's first assertion did not provide good cause.

Nor did his public-safety claim provide good cause. The Attorney General asserted that delay would "impede the effective registration of such sex offenders" and impair "efforts to protect the public

from sex offenders who fail to register through prosecution and the imposition of criminal sanctions." 72 Fed. Reg. at 8896. This claim "did little more than restate the general dangers" Congress "had sought to prevent when it enacted SORNA." *Valverde*, 628 F.3d at 1167. It did not demonstrate the need for an immediate rule—a rule that Congress declined to enact. *Id.*

The claim of urgency was undermined further by the fact that most sex offenders affected by the Interim Rule were already subject to state registration requirements and penalties. *See, e.g., Johnson*, 632 F.3d at 928. The Attorney General made no claim that this existing regulatory and criminal framework was insufficient, and Congress itself clearly thought that system sufficient for at least three years—it initially provided an implementation date for SORNA of July 2009. *Valverde*, 628 F.3d at 1166-67. All the Attorney General accomplished by declining to follow the APA's requirements was to let federal prosecutors bring cases about registration violations, which is a far cry from the prosecution of, let alone the prevention of, sex offenses. The second claim for a good-cause exception also fails.

Because the Attorney General lacked "good cause" for bypassing the APA's requirements, the interim rule was not valid. The Government cannot show that bypass was harmless. *Reynolds*, 2013 WL 979058, at *12-*13 (government bears burden because of liberty interest at stake). This is so for two reasons.

First, the Attorney General's bypass caused a "complete failure" of the notice-and-comment procedure and its goals. *Id.* at *13-*14. An "utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Sugar Cane Growers Co-op of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). Uncertainty exists here. SORNA's application to pre-enactment offenders was not a simple yes-or-no question. The decision presented "practical problems" that required thought, that might prove unduly expensive, and that might "warrant[] different federal registration treatment of different categories of pre-Act offenders." *Reynolds,* 132 S. Ct at 981.[24] None of these issues was aired adequately. Instead, "the process used to promulgate the rule was completely devoid of the 'exchange of views, information, and criticism between interested persons and the agency' that ensures well-reasoned and fair rules." *Reynolds*, 2013 WL 979058, at *17 (quoting *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 449 (3d Cir. 2011)).

The resulting interim rule came not from thoughtful comment and consideration, but from a hardening of the Government's litigation position that SORNA was retroactive, even without a regulation. *Reynolds*, 2013 WL 979058, at *17. As the Third

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[24] The Texas and New York letters to the Department of Justice show that these concerns are real. *See* Appendix B; *see also* GAO Report 19.

Circuit noted, that hardening demonstrated a lack of openness on the Attorney General's part to the questions implicated by retroactive application, and to post-promulgation comments. This lack of openness, in light of the fact that the decision regarding retroactivity was not an inescapable conclusion under the statute, showed that obviating notice-and-comment was harmful. *Reynolds*, 2013 WL 979058, at *16-*17 (citing *Reynolds*, 132 S. Ct. at 981).

Second, only the rule allowed Kebodeaux to be prosecuted in federal court for his failure to register in late 2007 and early 2008. *Reynolds*, 132 S. Ct. at 980-84. "[A] criminal prosecution founded on an agency rule should be held to the strict letter of the APA." *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989) (reversing conviction for notice-and-comment failure). The Sixth Circuit applied that principle in reversing a SORNA conviction because of notice-and-comment failure. *United States v. Utesch*, 596 F.3d 302, 312-13 (6th Cir. 2010).

Kebodeaux's conviction was not a harmless error to him. Allowing it to stand on a theory that the final valid rule was essentially the same as the invalid interim rule would offend a basic premise of our justice system—that an individual cannot be convicted and "punished for conduct occurring before the criminal regulation of that conduct." *Utesch*, 596 F.3d at 312-13 (citing U.S. Const. art. I, § 9, cl. 3 and *Weaver v. Graham*, 450 U.S. 24, 31 (1981)). It is rare that criminal liability attaches through regulation. *Cf. Reynolds*, 132 S. Ct. at 986-87 (Scalia, J.,

dissenting). It should be rarer still that it can attach without the proper regulatory procedures.

CONCLUSION

FOR THESE REASONS, Kebodeaux respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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DATED: March 27, 2013.

APPENDIX A

1. 42 U.S.C. § 16914 provides, in pertinent part:

§ 16914. Information required in registration

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Any other information required by the Attorney General.

2. The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030-70 (July 2, 2008) provide, in pertinent part:

VI. Required Registration Information

Section 114 of SORNA defines the required minimum informational content of sex offender registries. It is divided into two lists. The first list, set forth in subsection (a) of section 114, describes information that the registrant will normally be in a position to provide. The second list, set forth in subsection (b), describes information that is likely to require some affirmative action by the jurisdiction to obtain, beyond asking the sex offender for the information. Supplementary to the information that the statute explicitly describes, section 114(a)(7) and (b)(8) authorize the Attorney General to specify additional information that must be obtained and included in the registry. This expansion authority is utilized to require including in the registries a number of additional types of information, such as information about registrants' e-mail addresses, telephone numbers, and the like, information concerning the whereabouts of registrants who lack fixed abodes or definite places of employment, and information about temporary lodging, as discussed below.

Whether a type of information must be obtained by a jurisdiction and included in its sex offender registry is a distinct question from whether the jurisdiction must make that information available to

the public. Many of the informational items whose inclusion in the registry is required by section 114 and these Guidelines are not subject to a public disclosure requirement under SORNA, and some are exempt from public disclosure on a mandatory basis. The public disclosure requirements under SORNA and exceptions thereto are explained in Part VII of these Guidelines.

In order to implement requirements for the sharing of registration information appearing in other sections of SORNA (sections 113(c), 119(b), 121(b) – see Parts VII and X of these Guidelines for discussion), jurisdictions will need to maintain all required registration information in digitized form that will enable it to be immediately accessed by or transmitted to various entities. Hence, the jurisdiction's registry must be an electronic database, and descriptions of required types of information in section 114 should consistently be understood as referring to digitizable information rather than hard copies or physical objects. This does not mean, however, that all required registration information must be reproduced in a single segregated database, since the same effect may be achieved by including in the central registry database links or identification numbers that provide access to the information in other databases in which it is included (e.g., with respect to criminal history, fingerprint, and DNA information). These points are further discussed in connection with the relevant informational items.

As with SORNA's requirements generally, the informational requirements of section 114 and these Guidelines define a floor, not a ceiling, for jurisdictions' registries. Hence, jurisdictions are free to obtain and include in their registries a broader range of information than the minimum requirements described in this Part.

The required minimum informational content for sex offender registries is as follows:

Name, Aliases, and Remote Communication Identifiers and Addresses (§ 114(a)(1), (a)(7)):

Names and Aliases (§ 114(a)(1)): The registry must include "[t]he name of the sex offender (including any alias used by the individual)." The names and aliases required by this provision include, in addition to registrants' primary or given names, nicknames and pseudonyms generally, regardless of the context in which they are used, any designations or monikers used for self-identification in Internet communications or postings, and ethnic or tribal names by which they are commonly known.

Internet Identifiers and Addresses (§ 114(a)(7)): In the context of Internet communications there may be no clear line between names or aliases that are required to be registered under SORNA § 114(a)(1) and addresses that are used for routing purposes. Moreover, regardless of the label, including in registries information on designations used by sex offenders for purposes of routing or self-identification in Internet communications – e.g., e-mail and instant

messaging addresses – serves the underlying purposes of sex offender registration and notification. Among other potential uses, having this information may help in investigating crimes committed online by registered sex offenders – such as attempting to lure children or trafficking in child pornography through the Internet – and knowledge by sex offenders that their Internet identifiers are known to the authorities may help to discourage them from engaging in such criminal activities. The authority under section 114(a)(7) is accordingly exercised to require that the information included in the registries must include all designations used by sex offenders for purposes of routing or self-identification in Internet communications or postings.

Telephone Numbers (§ 114(a)(7)): Requiring sex offenders to provide their telephone numbers (both for fixed location phones and cell phones) furthers the objectives of sex offender registration. One obvious purpose in having such information is to facilitate communication between registration personnel and a sex offender in case issues arise relating to the sex offender's registration. Moreover, as communications technology advances, the boundaries blur between text-based and voice-based communications media. Telephone calls may be transmitted through the Internet. Text messages may be sent between cell phones. Regardless of the particular communication medium, and regardless of whether the communication involves text or voice, sex offenders may potentially utilize remote communications in efforts to

contact or lure potential victims. Hence, including phone numbers in the registration information may help in investigating crimes committed by registrants that involved telephonic communication with the victim, and knowledge that their phone numbers are known to the authorities may help sex offenders to resist the temptation to commit crimes by this means. The authority under section 114(a)(7) is accordingly exercised to require that the information included in the registries must include sex offenders' telephone numbers and any other designations used by sex offenders for purposes of routing or self-identification in telephonic communications.

Social Security Number (§ 114(a)(2), (a)(7)): The registry must include "[t]he Social Security number of the sex offender." In addition to any valid Social Security number issued to the registrant by the government, the information the jurisdiction requires registrants to provide under this heading must include any number that the registrant uses as his or her purported Social Security number since registrants may, for example, attempt to use false Social Security numbers in seeking employment that would provide access to children. To the extent that purported (as opposed to actual) Social Security numbers may be beyond the scope of the information required by section 114(a)(2), the authority under section 114(a)(7) is exercised to require that information on such purported numbers be obtained and included in the registry as well.

Residence, Lodging, and Travel Information (§ 114(a)(3), (a)(7)):

Residence Address (§ 114(a)(3)): The registry must include "the address of each residence at which the sex offender resides or will reside." As provided in SORNA § 111(13), residence refers to "the location of the individual's home or other place where the individual habitually lives." (For more as to the meaning of "resides" under SORNA, see Part VIII of these Guidelines.) The statute refers to places in which the sex offender "will reside" so as to cover situations in which, for example, a sex offender is initially being registered prior to release from imprisonment, and hence is not yet residing in the place or location to which he or she expects to go following release.

Other Residence Information (§ 114(a)(7)): Sex offenders who lack fixed abodes are nevertheless required to register in the jurisdictions in which they reside, as discussed in Part VIII of these Guidelines. Such sex offenders cannot provide the residence address required by section 114(a)(3) because they have no definite "address" at which they live. Nevertheless, some more or less specific description should normally be obtainable concerning the place or places where such a sex offender habitually lives – e.g., information about a certain part of a city that is the sex offender's habitual locale, a park or spot on the street (or a number of such places) where the sex offender stations himself during the day or sleeps at night, shelters among which the sex offender circulates, or places in public buildings, restaurants,

libraries, or other establishments that the sex offender frequents. Having this type of location information serves the same public safety purposes as knowing the whereabouts of sex offenders with definite residence addresses. Hence, the authority under SORNA § 114(a)(7) is exercised to require that information be obtained about where sex offenders who lack fixed abodes habitually live with whatever definiteness is possible under the circumstances. Likewise, in relation to sex offenders who lack a residence address for any other reason – e.g., a sex offender who lives in a house in a rural or tribal area that has no street address – the registry must include information that identifies where the individual has his or her home or habitually lives.

Temporary Lodging Information (§ 114(a)(7)): Sex offenders who reoffend may commit new offenses at locations away from the places in which they have a permanent or long-term presence. Indeed, to the extent that information about sex offenders' places of residence is available to the authorities, but information is lacking concerning their temporary lodging elsewhere, the relative attractiveness to sex offenders of molesting children or committing other sexual crimes while traveling or visiting away from home increases. Hence, to achieve the objectives of sex offender registration, it is valuable to have information about other places in which sex offenders are staying, even if only temporarily. The authority under SORNA § 114(a)(7) is accordingly exercised to provide that jurisdictions must require sex offenders to provide

information about any place in which the sex offender is staying when away from his residence for seven or more days, including identifying the place and the period of time the sex offender is staying there. The benefits of having this information include facilitating the successful investigation of crimes committed by sex offenders while away from their normal places of residence, employment, or school attendance, and decreasing the attractiveness to sex offenders of committing crimes in such circumstances.

Travel and Immigration Documents (§ 114(a)(7)): The authority under SORNA § 114(a)(7) is exercised to provide that registrants must be required to produce or provide information about their passports, if they have passports, and that registrants who are aliens must be required to produce or provide information about documents establishing their immigration status. The registry must include digitized copies of these documents, document type and number information for such documents, or links to another database or databases that contain such information. Having this type of information in the registries serves various purposes, including helping to locate and apprehend registrants who may attempt to leave the United States after committing new sex offenses or registration violations; facilitating the tracking and identification of registrants who leave the United States but later reenter while still required to register (see SORNA § 128); and crosschecking the accuracy and completeness of other types of information that registrants are required to provide – e.g., if

immigration documents show that an alien registrant is in the United States on a student visa but the registrant fails to provide information concerning the school attended as required by SORNA § 114(a)(5).

Employment Information (§ 114(a)(4), (a)(7)):

Employer Name and Address (§ 114(a)(4)): The registry must include "[t]he name and address of any place where the sex offender is an employee or will be an employee." SORNA § 111(12) explains that "employee" includes "an individual who is self-employed or works for any other entity, whether compensated or not." As the definitional provisions indicate, the information required under this heading is not limited to information relating to compensated work or a regular occupation, but includes as well name and address information for any place where the registrant works as a volunteer or otherwise works without remuneration. The statute refers to places in which the sex offender "will be an employee" so as to cover, for example, cases in which a sex offender is initially being registered prior to release from imprisonment and has secured employment that will commence upon his release, and other circumstances in which a sex offender reports an initiation or change of employment to a jurisdiction before the new employment commences. It does not mean that jurisdictions must include in their registries merely speculative information sex offenders have provided about places they may work in the future.

Other Employment Information (§ 114(a)(7)): A sex offender who is employed may not have a fixed place of employment – e.g., a long-haul trucker whose "workplace" is roads and highways throughout the country, a self-employed handyman who works out of his home and does repair or home-improvement work at other people's homes, or a person who frequents sites that contractors visit to obtain day labor and works for whatever contractor hires him on a given day. Knowing as far as possible where such a sex offender is in the course of employment serves the same public safety purposes as the corresponding information regarding a sex offender who is employed at a fixed location. The authority under section 114(a)(7) is accordingly exercised to require that information be obtained and included in the registry concerning the places where such a sex offender works with whatever definiteness is possible under the circumstances, such as information about normal travel routes or the general area(s) in which the sex offender works.

Professional Licenses (§ 114(a)(7)): The authority under section 114(a)(7) is exercised to require that information be obtained and included in the registry concerning all licensing of the registrant that authorizes the registrant to engage in an occupation or carry out a trade or business. Information of this type may be helpful in locating the registrant if he or she absconds, may provide a basis for notifying the responsible licensing authority if the registrant's conviction of a sex offense may affect his or her eligibility

for the license, and may be useful in crosschecking the accuracy and completeness of other information the registrant is required to provide – e.g., if the registrant is licensed to engage in a certain occupation but does not provide name or place of employment information as required by section 114(a)(4) for such an occupation.

School Information (§ 114(a)(5)): The registry must include "[t]he name and address of any place where the sex offender is a student or will be a student." Section 111(11) defines "student" to mean "an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education." As the statutory definition indicates, the requirement extends to all types of educational institutions. Hence, this information must be provided for private schools as well as public schools, including both parochial and non-parochial private schools, and regardless of whether the educational institution is attended for purposes of secular, religious, or cultural studies. The registration information requirement of section 114(a)(5) refers to the names and addresses of educational institutions where a sex offender has or will have a physical presence as a student. It does not require information about a sex offender's participating in courses only remotely through the mail or the Internet. (Internet identifiers and addresses used by a sex offender in such remote communications, however, must be included in the registration information as provided

in the discussion of "INTERNET IDENTIFIERS AND ADDRESSES" earlier in this list.) As with residence and employment information, the statute refers to information about places the sex offender "will be" a student so as to cover, for example, circumstances in which a sex offender reports to a jurisdiction that he has enrolled in a school prior to his commencement of attendance at that school. It does not mean that jurisdictions must include in their registries merely speculative information sex offenders have provided about places they may attend school in the future.

Vehicle Information (§ 114(a)(6), (a)(7)): The registry must include "[t]he license plate number and a description of any vehicle owned or operated by the sex offender." This includes, in addition to vehicles registered to the sex offender, any vehicle that the sex offender regularly drives, either for personal use or in the course of employment. A sex offender may not regularly use a particular vehicle or vehicles in the course of employment, but may have access to a large number of vehicles for employment purposes, such as using many vehicles from an employer's fleet in a delivery job. In a case of this type, jurisdictions are not required to obtain information concerning all such vehicles to satisfy SORNA's minimum informational requirements, but jurisdictions are free to require such information if they are so inclined. The authority under § 114(a)(7) is exercised to define and expand the required information concerning vehicles in two additional respects. First, the term "vehicle" should be understood to include watercraft and

aircraft, in addition to land vehicles, so descriptive information must be required for all such vehicles owned or operated by the sex offender. The information must include the license plate number if it is a type of vehicle for which license plates are issued, or if it has no license plate but does have some other type of registration number or identifier, then information concerning such a registration number or identifier must be included. To the extent that any of the information described above may be beyond the scope of section 114(a)(6), the authority under section 114(a)(7) is exercised to provide that it must be obtained and included in the registry. Second, the sex offender must be required to provide and the registry must include information concerning the place or places where the registrant's vehicle or vehicles are habitually parked, docked, or otherwise kept. Having information of this type may help to prevent flight, facilitate investigation, or effect an apprehension if the registrant is implicated in the commission of new offenses or violates registration requirements.

APPENDIX B

[SEAL]

OFFICE OF THE GOVERNOR

RICK PERRY
GOVERNOR

August 17, 2011

Linda M. Baldwin
Director
SMART Office
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U.S. Department of Justice
810 7th Street, NW, 6th Floor
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Dear Ms. Baldwin:

Thank you for your July 28 letter inquiring about the implementation of the federal Sex Offender Registration and Notification Act (SORNA) in Texas. Although we in Texas certainly appreciate and agree with the stated goals of SORNA, the adoption of this "one-size-fits-all" federal legislation in Texas would in fact undermine the accomplishment of those objectives in Texas, just as it would in most other states.

As you may be aware, the bipartisan Texas Senate Committee on Criminal Justice (Committee) carefully considered the question of compliance with SORNA over the past two years. After extensive review, including the receipt of public testimony during several "well attended and informative" hearings, the Committee firmly recommended that the Texas Legislature should not implement SORNA in Texas. As the Committee explained in its Interim

Report to the 82nd Legislature (*see* http://www.senate.state.tx.us/75r/Senate/commit/c590/c590.htm), implementation of SORNA would be both unnecessary and, counter-productive in Texas because:

- Texas already has a comprehensive array of statutes to punish, supervise, and protect the public from sex offenders, including those that require registration and publication, community supervision, child safety zones, future risk assessments, and civil commitment for certain high-risk offenders. Indeed Texas's sex offender laws are undeniably among the most stringent in the nation.

- SORNA's oversimplified registration and publication requirements, which apply based solely on the particular criminal offense, fail to accommodate for Texas's more appropriately tailored future risk assessments.

- By tying specific requirements, such as re-verification, DNA testing, and duration of registration, to offense "tiers," SORNA imposes expensive and burdensome requirements without regard to whether those requirements are necessary or appropriate in a particular case.

- By imposing such requirements in cases in which they are unnecessary, SORNA would create backlogs and strains on local law enforcement agencies that, as a practical matter, would effectively

undermine the objectives that SORNA is intended to meet.

- In dealing with juvenile sex offenders, Texas law more appropriately provides for judges to determine whether registration would be beneficial to the community and the juvenile offender in a particular case.
- By imposing oversimplified blanket registration requirements, SORNA would make it more difficult for Texas to focus on and address the most dangerous sex offenders, who pose the greatest public threat. Moreover, SORNA does so while merely assuming that the requirements are necessary in all cases, while failing to account for the negative impacts that unnecessary registration has on both juvenile offenders and the children of low-risk adult offenders.
- Implementation of all of SORNA's requirements would cost Texas more than 30 times the amount of the federal funds that the federal government has threatened to withhold from Texas if it fails to comply.

For these reasons, Texas's sex offender laws are more effective in protecting Texans than SORNA's requirements would be. In short, while Texas shares the federal government's objectives, the oversimplified means by which SORNA seeks to meet those objectives, while costing Texans significantly more,

would provide them with far less than Texas law already provides. While SORNA's approach might be appropriate for some states, it is not right for Texas.

In fact, we are advised that, to date, only 14 states have substantially implemented SORNA as the federal government has demanded. We would encourage you to consider that fact, as well as the information detailed in the Texas Senate Committee's report, as you evaluate the reality that there is a better way to achieve the goals that we share. We would look forward to discussing those alternatives with you.

Sincerely,

/s/ Jeffrey S. Boyd
Jeffrey S. Boyd
General Counsel and
Acting Chief of Staff

[LOGO]

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DEPUTY COMMISSIONER
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August 23, 2011

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810 7th Street, NW
Washington, DC 20531

Re: New York State

Dear Ms. Baldwin;

I am in receipt of your letter dated July 28, 2001 to Governor Cuomo indicating your preliminary findings that New York State has not substantially implemented the Sex Offender Registration and Notification Act (SORNA). Please accept this letter as notification that New York does not disagree with your findings. While New York looks forward to continuing to work together with the Department of Justice in the future, we are convinced that the statutory scheme set out by our legislature is in the best interests of New York State and the best way to protect our citizens. While we are concerned about the loss of federal financial support, especially in this

fiscal environment, the issues set out below when combined with the projected cost of SORNA requirements resulted in our decision. New York will continue to cooperate with the federal authorities and all other states in the effort to protect all victims against sexual predators by preventing the attacks against child and adult victims and bringing sexual predators to justice.

New York believes that our present laws and risk assessment method provide our citizens with effective protection against sexual predators. Initially enacted in 1996, New York law implements a risk assessment that considers the offender's background, prior criminal history, the manner in which the crime was committed and whether there was a plea bargain to a lesser included offense, the age of the victim and the offender's mental health history. This comprehensive look gives us an accurate prediction of the risk an offender poses to the community. After examining the proposed federal approach which focuses on the crime of conviction, we are concerned that the federal approach may both over- and understate threat in a way that is not consistent with our public safety goals.

New York has a long standing public policy of treating juvenile offenders differently from adult offenders so that juveniles have the best opportunity of rehabilitation and re-integration. The federal requirement that juveniles be placed on the Sex Offender Registry under SORNA is in direct conflict with that public policy. While New York law provides that the most dangerous juvenile offenders may be

prosecuted in adult courts and, if convicted, they would be placed on the Sex Offender Registry, our laws and public policy also acknowledge that other than those most dangerous offenders, children who commit crimes should avoid the ramifications of adult convictions.

Finally, the fiscal impact of implementation is significant with no improvement of public safety. As unfortunate as the loss of the funds will be to important programs in New York, the costs would be far greater than the loss. The in person reporting requirements for all Tiers would impose significant costs on law enforcement without a foreseeable public safety justification. The likelihood of required separate reporting facilities for juvenile offenders would also place an undue burden on local law enforcement. In addition, there are significant costs of technical construction a new registry and the likelihood of litigation to defend the implementation of the Act.

New York will continue its commitment to ensuring that our citizens are protected from sexual predators by the enforcement of all of our laws and the continued cooperation with your office. If you have any questions, please contact me at your earliest convenience.

Very truly yours,

/s/ Risa Sue Sugarman

Risa S. Sugarman
Deputy Commissioner
Director, Office of Sex Offender Management

Via Regular Mail and email to
Linda.Baldwin@usdoj.gov

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APPENDIX C

INDEX OF STATE SEX-OFFENDER REGISTRATION STATUTES IN EFFECT ON JULY 27, 2006 COVERING MILITARY AND FEDERAL OFFENDERS

Alabama
ALA. CODE 1975 A § 13A-11-200(b) (2006)

Alaska
ALASKA STAT. ANN. § 12.63.100 (West 2006)

Arizona
ARIZ. REV. STAT. § 13-3821 (2006)

Arkansas
ARK. CODE ANN. § 12-12-903(12)(A)(iii) (West 2006)

California
CAL. PENAL CODE § 290(2)(D)(I) & (ii) (West 2006)

Colorado
COLO. REV. STAT. ANN. § 16-22-103(1)(B) (West 2006)

Connecticut
CONN. GEN. STAT. § 54-253(a) (West 2006)

Delaware
DEL. CODE ANN. § 4120(e)(1) (2006)

District of Columbia
D.C. CODE § 22-4001(6)(e) (2006)

Florida
FLA. STAT. ANN. § 944.607(1)(a)(2) (West 2006)

Georgia
GA. CODE ANN. § 42-1-12(e)(5) (West 2006)

Hawaii
HAW. REV. STAT. § 846E-1 (2006)

Idaho
IDAHO CODE ANN. § 18-8303(8) (2006)

Illinois

730 ILL. COMP. STAT. ANN. 150/2(a)(1) (West 2006)

Indiana

IND. CODE ANN. § 11-8-8-5(a)(15) (West 2006)

Iowa

IOWA CODE ANN. § 692A.2(1) (West 2006)

Kansas

KAN. STAT. ANN. § 22-4902(a)(8) (West 2006)

Kentucky

KY. REV. STAT. ANN. § 17.500(8)(c) (West 2006)

Louisiana

LA. REV. STAT. ANN. § 15:541(14.1) (2006)

Maine

ME. REV. STAT. ANN. tit. 34-A, § 11203(3-A) & (6)(C) (2006)

Maryland

MD. CODE ANN. CRIM. PROC. § 11-701(b)(4) & (d)(9) (West 2006)

Massachusetts

MASS. GEN. LAWS ANN. ch. 6, § 178C (West 2006)

Michigan

MICH. COMP. LAWS ANN. § 28.722, sec. 2(a)(I) (West 2006)

Minnesota

MINN. STAT. ANN. § 243.166 (Subd.1b)(4) (West 2006)

Mississippi

MISS. CODE ANN. § 45-33-23(a) (West 2006)

Missouri

MO. ANN. STAT. § 589.400(1)(5) (West 2006)

Montana

MONT. CODE ANN. § 46-23-502(9)(b) (2006)

Nebraska
NEB. REV. STAT. § 29-4003(1)(b) (2006)

New Hampshire
N.H. REV. STAT. ANN. § 651-B:1(III)(b) (2006)

New Jersey
N.J. STAT. ANN. § 2C:7-2(b)(3) (West 2006)

New Mexico
N.M. STAT. ANN. § 29-11A-3(D)(2) (West 2006)

New York
N.Y. CORRECT. LAWS § 168-a(2)(d) (McKinney 2003)

Nevada
NEV. REV. STAT. ANN. § 179D.410(18)(B) (West 2006)

North Carolina
N.C. GEN. STAT. ANN. § 14-208.6(4)(c) (West 2006)

North Dakota
N.D. CENT. CODE ANN. § 12.1-32-15(1)(a) (West 2005)

Ohio
OHIO REV. CODE ANN. § 2950.01(D)(1)(f) (West 2006)

Oklahoma
OKLA. STAT. ANN. tit. 57, § 582(B) & (C)
(West 2006)

Oregon
OR. REV. STAT. ANN. § 181.594(5)(d) (West 2006)

Pennsylvania
tit. 42 PA. CONST. STAT. ANN. § 9795.2(b)(4)
(West 2006)

Rhode Island
R.I. GEN. LAWS ANN. § 11-37.1-3(a) (West 2006)

South Carolina
S.C. CODE ANN. § 23-3-430 (2006)

South Dakota
S.D. CODIFIED LAWS § 22-24B-1(17) (2007)

Tennessee

TENN. CODE ANN. § 40-39-301 (1) & (3) (West 2006)

Texas

TEX. CODE CRIM. PROC. ART. 62.001(5)(H) (West 2006)

Utah

UTAH CODE ANN. § 77-27-21.5(1)(F) (ii) & (iii) (West 2006)

Vermont

Vt. STAT. ANN. tit. 13, § 5401(10)(C) (West 2006)

Virginia

VA CODE ANN. § 9.1-902(F) (West 2006)

Washington

WASH. REV. CODE ANN. § 9A.44.130(4)(a)(iii) (West 2006)

Wisconsin

WIS. STAT. ANN. § 301.45 (1d)(a)(4) (West 2006)

West Virginia

W. VA. CODE ANN. § 15-12-2(b) (West 2006)

Wyoming

WYO. STAT. ANN. § 7-19-301 (a)(iv) (West 2006)

REPLY BRIEF

APR 10 2013
OFFICE OF THE CLERK

No. 12-418

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY JAMES KEBODEAUX

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 12-418

UNITED STATES OF AMERICA, PETITIONER

v.

ANTHONY JAMES KEBODEAUX

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent's central contention (Br. 19-47) echoes that of the court of appeals: that the application of a federal sex-offender-registration requirement to him exceeds Congress's powers because "[i]t permits the Federal Government to reach back, after a federal sentence has expired, to impose sex-offender registration and penalty provisions," Br. 17, and to "reassert[] federal control over an offender after * * * he had returned to the responsibility and control of the State," Br. 33. See Pet. App. 2a. But respondent does not dispute that Congress could have made sex-offender registration a condition of a lengthy period of *criminal* supervised release and enforced that condition long after a federal offender had otherwise returned to the jurisdiction of a State. He provides no adequate reason for barring Congress from achieving the same result through a *civil* sex-offender-registration provision.

"It is well settled that Congress may impose both a criminal and a civil sanction in respect to the same act or omission." *United States* v. *Ursery*, 518 U.S. 267, 292 (1996) (internal quotation marks and citation omitted). Accordingly, when Congress has authority to regulate a sex offense—as it clearly does when committed by a member of the Armed Forces—it may establish both a criminal punishment and a civil regulatory regime of sex-offender registration. Cf. *Hudson* v. *United States*, 522 U.S. 93 (1997) (imposition of both criminal sanctions and civil occupational debarment for violation of federal banking statutes). Respondent provides no valid basis for insisting that Congress must enact that civil sanction before he is released from federal custody or forever lose its power to do so. The Ex Post Facto Clause does not prevent Congress from imposing sex-offender registration retroactively based on pre-enactment conduct and convictions. See *Smith* v. *Doe*, 538 U.S. 84 (2003). Congress's unquestioned power to impose civil sex-offender registration at the time of conviction does not lapse if exercised later.

Respondent also fails to offer any persuasive response (Br. 47-58) to the government's showing that he was under a federal sex-offender-registration obligation at the time of his release from federal custody in 1999. That fact alone vitiates the court of appeals' rationale. And the Court should decline to address respondent's unpreserved alternative ground for affirmance (Br. 58-66), which alleges that he was harmed by a violation of the notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553(b).

I. CONGRESS HAS AUTHORITY TO REQUIRE REGISTRATION BY FEDERAL SEX OFFENDERS WHO PREVIOUSLY COMPLETED THEIR FEDERAL SENTENCES

Even assuming that pre-SORNA federal law did not require respondent to register as a sex offender when he completed his federal sentence, Congress had Article I authority to impose the civil remedy of requiring released sex offenders to register (and to update their registrations) and also to criminalize violations of that civil requirement.

A. Section 2250(a)(2)(A) Is A Necessary And Proper Measure Under The Enumerated Powers That Support Federal Sex Offenders' Statutes Of Conviction

Like the federal civil-commitment provision upheld in *United States* v. *Comstock*, 130 S. Ct. 1949 (2010), the criminal enforcement provision of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. 2250(a)(2)(A) is a necessary and proper measure to effectuate the enumerated powers that support the statutes under which federal sex offenders are convicted. See U.S. Br. 30-48. Respondent organizes the bulk of his argument around the five considerations discussed in *Comstock*, but his claims founder on three incorrect propositions: first, that the federal government has no legitimate interest in prescribing registration and notification for former federal sex offenders once they have been released from federal custody and supervision (Br. 23-37); second, that SORNA fails to accommodate States' sovereignty and interests (Br. 20-23, 37-39); and third, that Section 2250(a)(2)(A) constitutes a "burdensome" and "intrusive form of federal regulation" (Br. 21, 35-36).

1. Section 2250(a)(2)(A) serves a legitimate purpose associated with the presence of federal sex offenders in the community

In determining what "criminal and * * * civil sanction[s]" to impose on federal sex offenders, *Ursery*, 518 U.S. at 292, Congress reasonably chose registration-and-notification requirements as one means "to protect the public" from such offenders, 42 U.S.C. 16901. It also reasonably authorized imposing those requirements on persons who had already been released from custody. See U.S. Br. 33-35, 37-38; *Smith*, 538 U.S. at 102-104.

a. Respondent contends (Br. 27-28) that the protection of the public can never be a legitimate use of federal power, because that would be tantamount to a "general police power." But exercising power over federal offenders is not a *general* police power. Rather, "protect[ing] the public" is a basic purpose of post-release supervision of federal prisoners. *United States* v. *Johnson*, 529 U.S. 53, 59 (2000) (quoting 18 U.S.C. 3553(a)(2)); cf. *United States* v. *Salerno*, 481 U.S. 739, 747 (1987) ("preventing danger to the community is a legitimate regulatory goal" justifying pretrial detention of federal defendants). When an actor's conduct brings him within federal authority, Congress can protect the public through criminal sanctions, civil regulatory provisions, or a combination of the two. See *Hudson*, *supra*. And *Comstock* confirms that public safety can be a legitimate means of effectuating an underlying federal power after a defendant is released from custody. See 130 S. Ct. at 1960-1961; *id.* at 1970 (Alito, J., concurring in the judgment).

As relevant here, the federal government has a legitimate interest in the potential threat to public safety posed by persons with previous federal sex-offense con-

victions, who "typically would have spent time under federal criminal supervision." *Carr* v. *United States*, 130 S. Ct. 2229, 2238 (2010). The nature of their previous federal convictions gives reason to think they may be particularly dangerous. *Smith*, 538 U.S. at 103; *McKune* v. *Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion). And the federal government's imposition of those convictions gives it a particular interest in protecting against the associated threat to public safety. It is accordingly reasonable for Congress to ensure that those offenders' presence in the community is made known to state and local authorities.

Significantly, respondent acknowledges (Br. 34) that sex-offender-registration requirements may be legitimately imposed as part of a criminal sentence or term of probation or supervised release (as they often are, see U.S. Br. 40). A registration requirement serves the same legitimate, nonpunitive purpose whether it is part of a criminal sentence or, as here, a "collateral" civil consequence of a prior conviction. *Chaidez* v. *United States*, 133 S. Ct. 1103, 1108 n.5 (2013). Respondent repeatedly describes SORNA's application here as "reaching back" (Br. 17, 34, 40), but he does not dispute that SORNA poses no ex-post-facto problem because its "registration requirements are civil regulations whose purpose is not to punish for crimes." Pet. App. 11a n.17; see Resp. Br. 32 ("reporting requirements * * * are not part of the punishment for a crime"); U.S. Br. 18 n.5, 41 n.20.

Congress did not lose its Article I authority to address respondent's military sex offense when he was discharged from the service and military custody. For example, it is "wholly within the constitutional power of Congress to * * * provide for federal district court

trials of discharged soldiers accused of offenses committed while in the armed services." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 21 (1955); cf. *United States* v. *Green*, 654 F.3d 637 (6th Cir. 2011) (upholding such a conviction, under the Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. 3261), cert. denied, 132 S. Ct. 1056 (2012). And Congress may impose both civil and criminal sanctions for misconduct in the military. See *Ursery*, 518 U.S. at 292. If the federal government may address respondent's military sex-offense under its Article I authority even after all military ties are severed, then it can—absent ex-post-facto or other constitutional constraints not implicated here, U.S. Br. 18 n.5—also impose the civil collateral consequence of sex-offender registration on a former military member who committed his sex offense while in the military. Discharge (or the completion of a military sentence) has no effect on that Article I power.

b. Like the court of appeals (see Pet. App. 16a-17a), respondent contends (Br. 34-37) that the government in *Comstock* renounced any authority over federal offenders following completion of their sentences. But the government did not concede—and the Court did not hold—that no federal power of any sort may be applied to a federal prisoner "whose sentence has expired." Resp. Br. 34. The Solicitor General's statements concerned "the power to commit a person." *Comstock*, 130 S. Ct. at 1965 (quoting Tr. of Oral Arg. at 9, *Comstock*, *supra* (No. 08-1224)). That limitation is borne out by the questions from oral argument quoted by respondent. Br. 34-35. And it is confirmed by the Court's quotation of the Solicitor General to underscore the narrowness of Section 4248, which authorized civil commitment only of "individuals already 'in the custody of the' Federal Gov-

ernment," *Comstock*, 130 S. Ct. at 1964 (quoting 18 U.S.C. 4248(a)), as opposed to those who had already been released and would have to be detained anew.

While the Solicitor General stated that "the Federal Government would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed," *Comstock*, 130 S. Ct. at 1965 (citation omitted), two important factors distinguish civil commitment from a registration requirement. First, civil commitment addresses the immediate dangers posed by a person's release from prison, or from post-release supervision, because of his mental condition at that time (without regard to the nature of his underlying conviction, see U.S. Br. 34). Once that person has been released and has returned to his life in the community, it can be reasonably thought that the government's "power to act as a responsible federal custodian" subsides. *Comstock*, 130 S. Ct. at 1961. In contrast, sex-offender registration is a consequence of the federal conviction and the nature of the underlying federal criminal violation. The federal government can address a person who violates federal law through criminal measures and civil measures—and need not do the latter immediately upon conviction. Second, civil commitment is much more drastic than sex-offender registration. It removes the offender from the community and from the State's police power altogether. In contrast, a registration requirement leaves the defendant in the community, subject to state regulation. The latter approach is much more "accomodati[ng] of state interests." *Ibid.* It is unremarkable that the more modest power can be used in circumstances where the more extensive one cannot. See U.S. Br. 42.

c. In *Carr* the Court found it "entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders." 130 S. Ct. at 2238. Respondent labels that statement "cursory dicta," Br. 29 (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968)), but it formed an integral part of the Court's statutory analysis, see U.S. Br. 35 n.16. Respondent does not explain how a regulatory choice that this Court recently characterized as "entirely reasonable" is simultaneously constitutionally illegitimate.

2. Section 2250(a)(2)(A) respects the States' police powers and accommodates state interests

Respondent contends that SORNA "compromised essential attributes of State sovereignty" because the federal government "entered an area" (*i.e.*, sex-offender registration) "where the States have robustly exercised their authority." Br. 20 (capitalization modified).[1] But Congress's enumerated powers give it a legitimate and important role to play in addressing the national problem of sex offenders. "Congress may legislate in areas traditionally regulated by the States," *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991), and, so long as it exerts enumerated powers, Congress may "address[] a legitimate federal concern by licensing federal prosecution in an area historically of state concern," *Sabri* v. *United States*, 541 U.S. 600, 608 n.* (2004); see *Comstock*, 130

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[1] Despite his invocation of the Tenth Amendment (Br. 1, 19), respondent does not suggest that SORNA coerces or commandeers state officials. No court has embraced such a claim, and SORNA's financial incentives have no coercive impact; indeed, five States have declined federal money. See U.S. Br. 6 n.2, 53.

S. Ct. at 1954, 1956 (noting that federal law authorizing civil commitment of sexually dangerous persons was "similar" to earlier "statutes enacted under state law").

More specifically, respondent contends (Br. 38) that Section 2250 requires a State to "forfeit its own sovereign interest in regulating sex offenders living within its borders to prevent enforcement of federal sex-offender laws." That is not true. Because sex offenders must register with state registries, and because 18 U.S.C. 2250(b) includes an impossibility defense, the federal government's ability to bring a prosecution under Section 2250 turns on what registration information a State is willing to accept and on the intervals at which it is willing to accept that information. Thus, SORNA may "require more frequent reporting" or more information than the State otherwise would (Resp. Br. 21, 39), but, as applied to the States, those requirements are "only conditions required to avoid the reduction of Federal funding," 42 U.S.C. 16925(d).[2] They will not permit a federal prosecution if a State declines to permit what it views as over-registration. Cf. *United States* v. *Stock*, 685 F.3d 621, 626 n.3 (6th Cir. 2012) (in light of Section 2250(b), a "state's theoretical refusal to accept SORNA-required sex-offender registrations is not a federal-state double bind for sex offenders").

Furthermore, respondent mischaracterizes (Br. 37-39) the posture of the States generally, and New York and Texas in particular, with respect to SORNA's im-

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[2] Because funding is conditioned on substantial implementation, minor deviations from SORNA often do not trigger the penalty. See U.S. Gov't Accountability Office, *GAO-13-211: Sex Offender Registration and Notification Act: Jurisdictions Face Challenges to Implementing the Act, and Stakeholders Report Positive and Negative Effects* 15 (Feb. 2013), www.gao.gov/assets/660/652032.pdf.

plementation. Forty-five States, including New York, have substantially implemented SORNA or are continuing to receive federal funds that are reallocated "solely for the purpose of" implementing SORNA, 42 U.S.C. 16925(c). See U.S. Br. 6 n.2; Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, U.S. Dep't of Justice (SMART Office), *Newsroom*, http://smart.gov/newsroom.htm (last visited Apr. 9, 2013). Respondent cites a legislative committee's recommendation that Texas repeal two subsections of its sex-offender-registration law so that Texas would not be bound by federal minimum registration periods. Br. 39 (citing Tex. Sen. Comm. on Crim. Justice, *Interim Report to the 82d Legislature* 4, 19 (Dec. 15, 2010), www.senate.state.tx.us/75r/senate/commit/c590/c590.InterimReport81.pdf). The legislature, however, rejected that particular recommendation. While it refrained from taking other steps to implement SORNA, it retained a prohibition on reducing registration periods based on risk assessments unless they "exceed[] the minimum required registration period[s] under federal law," and it removed a reference to the Wetterling Act, which had the effect of clarifying that SORNA is the controlling "federal law" for that purpose. See Tex. Code Crim. Proc. Ann. art. 62.402(a) and (b) (West Supp. 2012); *id.* art. 62.405(b)(2) (West 2006).

Nor, in most regards, can respondent claim that Texas's registration laws are more lenient than SORNA. Where federal law would require him to update his address within three business days after moving, 42 U.S.C. 16913(c), Texas law requires him to report at least seven days before moving and again within seven days after moving, Pet. App. 167a-168a; Tex. Code Crim. Proc. Ann. art. 62.055(a) (West Supp. 2012). Even after cor-

recting for an error that respondent attributes to the State, Texas requires him to register for life and to report at least once per year. Resp. Br. 4 & n.3; Tex. Code Crim. Proc. Ann. art. 62.058(a) (West 2006). Federal law requires him to register for a shorter period (25 years) and to report slightly more often (every six months). 42 U.S.C. 16915(a)(2), 16916(2).[3] Under Texas law (again correcting for the prior state error), respondent's failure to update his address was punishable by a term of imprisonment between two and ten years—a range with the same maximum sentence as SORNA, but with a minimum that was twice as long as his year-and-a-day sentence. Resp. Br. 5; Tex. Code Crim. Proc. Ann. art. 62.102(b)(2) (West 2006); 18 U.S.C. 2250(a); Pet. App. 78a.[4]

3. Section 2250(a)(2)(A) enforces a limited federal requirement on persons who have already brought themselves within federal authority

In attempting to distinguish his case from the civil-commitment statute upheld in *Comstock*, respondent contends (Br. 35) that SORNA imposes "burdensome and long-lasting registration obligations." But sex-offender registration—even when imposed years after release—is unquestionably a more modest power than civil commitment, which may extend federal confinement indefinitely. And offenders like respondent are already subject to similar state registration require-

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[3] Under SORNA, respondent is a Tier II offender, because his sex offense was more severe than abusive sexual contact in violation of 18 U.S.C. 2244(a)(3). See 42 U.S.C. 16911(3)(A)(iv).

[4] Although respondent suggests (Br. 36-37) that Texas did not wish for him to be prosecuted, the record does not reflect any state objection to federal prosecution.

ments, the validity of which respondent does not contest.[5] As a result, the federal law "intrusi[on]" (Resp. Br. 21) does not impose vastly new burdens, and, as discussed above, it can be enforced under Section 2250(a) only to the extent that the relevant States are willing to accept the additional information.

Upholding federal sex-offender registration for federal sex offenders would not imply that Congress can "reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it." *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2592 (2012) (*NFIB*) (opinion of Roberts, C.J.). The federal role under Section 2250(a)(2)(A) responds to a distinctly federal interest: it applies only to individuals who have "br[ought] themselves within the sphere of federal regulation" by committing a federal sex offense. *Ibid.* The enumerated power that justifies criminalizing the underlying sex offense, together with the Necessary and Proper Clause, therefore justifies the sex-offender-registration requirement enforced by Section 2250(a)(2)(A).

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[5] Respondent says (Br. 21) that SORNA requests "a wide variety of personal information." But Texas law requires nearly all of that same information—including name, aliases, online identifiers, social security number, addresses and telephone numbers, business and professional licenses, color photographs, and fingerprints—as well as some information SORNA does not require, such as shoe size. Compare Tex. Code Crim. Proc. Ann. art. 62.051(c) (West Supp. 2012), with 42 U.S.C. 16914(a), and 73 Fed. Reg. 38,055-38,058 (July 2, 2008).

B. Section 2250's Federal-Offender-Specific Provision Is A Focused And Rational Component Of A Comprehensive National Framework

Congress drew upon a constellation of enumerated powers to create and support, in concert with the States, "a comprehensive national system for the registration of [federal and state sex] offenders." 42 U.S.C. 16901. To effectuate that system, it reasonably provided that the federal government would accept a "special role in ensuring compliance with SORNA's registration requirements by federal sex offenders." *Carr*, 130 S. Ct. at 2238. See U.S. Br. 48-55. Accordingly, those powers also justify Section 2250(a)(2)(A).

1. Respondent concedes (Br. 46-47) that many other components of SORNA's comprehensive scheme are constitutional, including Section 2250(a)(2)(B)'s coverage of federal and state sex offenders who travel interstate, and Section 2250(a)(2)(A)'s coverage in contexts involving federal property or Indian tribes. And while he suggests in passing (Br. 51 n.19) that the court of appeals did not reach the issue, he does not contest that Section 2250(a)(2)(A) legitimately applies to sex offenders who were subject to federal custody or supervision when SORNA became applicable. Nevertheless, he argues (Br. 17, 42) that Section 2250(a)(2)(A) is unconstitutional as applied here because the individual enumerated powers that support those other applications do not "individually authorize[]" its application to persons like him.

Respondent's divide-and-conquer methodology conflicts with this Court's precedents. The federal government's status as "'one of enumerated powers[]' * * * means that '[e]very law enacted by Congress must be based on *one or more* of' those powers." *Comstock*, 130 S. Ct. at 1956 (quoting *McCulloch* v. *Maryland*, 17 U.S.

(4 Wheat.) 316, 405 (1819), and *United States* v. *Morrison*, 529 U.S. 598, 607 (2000)) (emphasis added). And the Necessary and Proper Clause serves as "an additional power, not a restriction on those already granted." *McCulloch*, 17 U.S. (4 Wheat.) at 420. Accordingly, that clause "empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation." *Gonzales* v. *Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment).

The challenged federal-offender provision is supported by the Necessary and Proper Clause because it is a modest measure that helps fill a gap in Congress's comprehensive scheme.

2. That conclusion finds support in *Sabri*, which rejected an Article I challenge to 18 U.S.C. 666, a federal statute criminalizing bribery of officials at entities receiving federal funds. *Sabri* was not, as respondent asserts (Br. 42), simply a case about "money and its fungibility." The Court reasoned that Congress had an interest not just in the federal funds themselves but also in the "integrity of the state, local, and tribal recipients of federal dollars," even without a traceable connection between the bribe and federal funds. *Sabri*, 541 U.S. at 605-606; see *id.* at 606 (noting that *Westfall* v. *United States*, 274 U.S. 256 (1927), had "uph[eld] [a] federal law criminalizing fraud on a state bank member of [a] federal system, even where federal funds [were] not directly implicated").

Sabri stressed that Congress enacted Section 666 to fill "regulatory gaps" and "only after other legislation" had failed, which provided "further indication that [Congress] was acting within the ambit of the Necessary and Proper Clause." 541 U.S. at 607. The same is true of SORNA, which was enacted only after more than a

decade of narrower legislative efforts had failed. See U.S. Br. 3-4. Congress sought to cure deficiencies in the prior system that had prevented the States and the federal government from adequately keeping track of sex offenders. See *Reynolds* v. *United States*, 132 S. Ct. 975, 978 (2012); *Carr*, 130 S. Ct. at 2240; *id.* at 2249 (Alito, J., dissenting). And Congress's interest in the integrity of the registration system it fostered justifies a distinctive federal role in ensuring that federal offenders register with their States even in the absence of interstate travel.

3. In short, the narrow power at issue in this case—to enforce against a subset of federal sex offenders a federal requirement to register with state sex-offender registries that are often supported by federal funding—"did not involve the exercise of any 'great substantive and independent power.'" *NFIB*, 132 S. Ct. at 2593 (opinion of Roberts, C.J.) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411). "Instead, it concerned only the constitutionality of 'individual *applications* of a concededly valid statutory scheme.'" *Ibid.* (quoting and adding emphasis to *Raich*, 545 U.S. at 23).

II. RESPONDENT WAS ALREADY SUBJECT TO A FEDERAL CRIMINAL PENALTY FOR FAILURE TO REGISTER WHEN HE COMPLETED HIS FEDERAL SENTENCE

The threshold premise of the court of appeals' constitutional analysis was that SORNA required the federal government to "reassert jurisdiction" over respondent, because he had been "unconditional[ly] release[d] from federal custody" in 1999. Pet. App. 2a. That premise is incorrect, U.S. Br. 18-29, and none of respondent's three counter-arguments is persuasive.

A. Respondent contends (Br. 51-54) that pre-SORNA law did not "impose a federal registration requirement"

on federal sex offenders, because it only subjected them to a federal criminal "penalty for failing to register." But Congress routinely specifies penalties for violations without articulating an independent command that the person shall refrain from violating the statute. See, *e.g.*, 18 U.S.C. 666(a). In such instances, "[i]f a statute inflicts a penalty for doing an act, the penalty implies a prohibition." 1 James Kent, *Commentaries on American Law* 436 (1826). Here, the federal penalty for failure to register as a sex offender establishes a federal requirement to register with available state registries. An individual subject to such penalties—as respondent was from the time of his release from custody—is subject to Congress's exercise of jurisdiction to regulate his conduct.

B. Alternatively, respondent disputes (Br. 54-58) that, when he was released in 1999, the two provisions of the Wetterling Act on which the government relies actually applied to him.

1. The criminal penalty in 42 U.S.C. 14072(i)(3) applied to persons "described in [18 U.S.C.] 4042(c)(4)," which, by virtue of a Bureau of Prisons (BOP) regulation, included persons convicted of carnal knowledge in violation of Article 120(b) of the Uniform Code of Military Justice (10 U.S.C. 920(b)). See 28 C.F.R. 571.72. Respondent is such a person. U.S. Br. 20-22.[6]

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[6] Respondent conjectures that the designation of his offense pursuant to 18 U.S.C. 4042(c)(4)(E) (2000) (repealed effective 2009) was "likely invalid" (Br. 56 n.22) because the Director of BOP, on the basis of good cause, dispensed with the APA's default requirements of advance notice and comment and a delayed effective date, 5 U.S.C. 553(b) and (d). Respondent's tentative surmise was not included in his brief opposing certiorari, see Sup. Ct. R. 15.2, and has been adopted by no court. This Court should not address it. See *Chaidez*, 133 S. Ct. at 1113 n.16.

Respondent contends (Br. 55) that the cross-reference to Section 4042(c)(4) did not include him because the adjacent subsection made all of Section 4042 inapplicable to "persons confined" in military penal institutions. 18 U.S.C. 4042(d). But Section 14072(i)(3) cross-referenced only the list of persons described in Paragraph (4) of Section 4042(c)—not the class of persons to whom Section 4042 as a whole applied. Zeroing in on that specific paragraph to provide a list of sex offenses fits perfectly with Section 14072(i)(3); the rest of Section 4042 (irrelevantly) addressed various duties of BOP. In any event, the text of Subsection (d) itself defeats respondent's argument, because it carved out only "persons confined" in military institutions, not those who were *previously* confined in such institutions. Thus, when respondent was released from military custody in 1999, he continued to be a person "described in" Section 4042(c)(4), but Subsection (d) could no longer keep any of Section 4042 from applying to him.

As Judge Haynes concluded in her dissent (Pet. App. 66a-70a), the criminal penalty in Section 14072(i)(3) applied to respondent upon his release in 1999 and demonstrated that Congress had already asserted jurisdiction to require him to register as a sex offender (upon pain of imprisonment).

2. The criminal penalty in 42 U.S.C. 14072(i)(4) also subjected respondent to a penalty for failure to register. That provision reached persons sentenced by court-martial for designated sex offenses, and respondent's offense of conviction was included in the relevant list, which was first promulgated in a "directive-type memorandum" (DTM) that was "effective immediately" upon its issuance on December 23, 1998. See U.S. Br. 22-25; Pet. App. 171a-176a (reprinting DTM). Respondent

questions (Br. 57) the validity of that DTM, suggesting that it may have been issued without "a valid delegation" from the Secretary of Defense and that "it was effective for only 90 days."

Even apart from the "presumption of regularity" that attaches to the DTM, see *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926), respondent's objections fail. The relevant delegation was contained in the chartering directive for the Assistant Secretary of Defense for Force Management Policy, which was in effect between 1994 and 2003 and delegated authority to "[i]ssue DoD Instructions, DoD Publications, and one-time directive-type memoranda * * * that implement policy approved by the Secretary of Defense in assigned fields of responsibility," including the "discipline[] and separation of all DoD personnel." DoD Directive 5124.5, paras. D.1.a, F.1.a (Oct. 31, 1994); see 10 U.S.C. 113(d).

Nor did the DTM lapse, as respondent asserts (Br. 57), when it was not reissued within 90 days. Respondent correctly notes that current DoD policy provides that a DTM is generally "effective for no more than 6 months from the date signed." Resp. Br. 57 n.23 (quoting DoD Instruction 5025.01, at 2 (Sept. 26, 2012)). But that was not DoD policy in 1999. The relevant directive contemplated that certain DTMs that "cannot be published in the DoD Directives System at the time of signature shall be reissued as DoD issuances within 90 days." DoD Directive 5025.1, para. D.5 (June 24, 1994). Unlike the current policy, however, it did not specify that any DTM would otherwise cease to be effective at any time before it was affirmatively cancelled or revoked, and no such "sell-by date" should be implied.[7] Cf.

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[7] Respondent suggests (Br. 6, 57) that DoD did not begin implementing the Wetterling Act until September 28, 1999. But the report

Dolan v. *United States*, 130 S. Ct. 2533 (2010) (deadlines do not automatically vitiate power to act).

The DTM designated respondent's offense, and it was effective before, during, and after his offense conduct, conviction, and sentence. U.S. Br. 23. Section 14072(i)(4) thus required him to register as a sex offender or face federal prosecution.

C. Respondent also asserts (Br. 48-51) that the Fifth Circuit's conception of "unconditional release" referred only to release from prison, the military, and supervisory conditions on release (like parole); the court would, in his view, not count a separate federal registration requirement. The Fifth Circuit, however, apparently thought otherwise, because in responding to Judge Haynes's dissent—which relied on 42 U.S.C. 14072(i)(3) to conclude that respondent "had been continuously subject to federal registration requirements of some sort," Pet. App. 70a—the majority explained only that, because respondent could register with Texas, he was not required to register directly with the federal government, *id.* at 4a n.4 (citing statutory provisions referring to registration with the FBI in States lacking compliant registration schemes). The majority did not indicate that, if it were applicable, a federal-law registration requirement would not reflect a continuous assertion of

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he cites acknowledged the December 23, 1998, DTM. See Office of the Inspector Gen., Dep't of Defense, *Report No. CIPO2002S003: Evaluation of DoD Correctional Facility Compliance with Military Sex Offender Notification Requirements* 5 n.16 (June 26, 2002), www.dodig.mil/Inspections/IPO/reports/2002S003.pdf. It also noted that the Air Force began to "publish[] Service-wide policy to govern sex offender notifications" on June 21, 1999—before respondent's release. *Id.* at 7. Under that policy, notification was triggered by convictions for any of the same 18 offenses that were designated in the DTM. See Air Force Instruction 31-205, at 78 (June 21, 1999).

federal jurisdiction. *Id.* at 4a n.4. Correcting the court of appeals' mistaken view about the significance of 42 U.S.C. 14072(i)(3) and (4)—*i.e.*, confirming that those provisions *did* impose a federal registration requirement on respondent—would therefore undermine the premise of the court's "impermissible-reassertion" analysis of SORNA's constitutionality.

The court of appeals clearly believed that the moment of release from federal custody has constitutional significance. See U.S. Br. 27. And subsequent (unpublished) Fifth Circuit decisions follow that line by holding that SORNA is constitutional when applied to "[e]very federal sex offender subject to federal custody or supervision when SORNA was enacted, or who was convicted since then." Pet. App. 41a-42a.[8] The same reasoning would sustain any registration requirement that was in effect when respondent was in federal custody in 1999—and that, in turn, would establish a continuous assertion of federal jurisdiction over respondent up to and beyond the enactment of SORNA. *Id.* at 71a-73a (Haynes, J., dissenting). Such a holding, by itself, would justify reversing the judgment below, or vacating and remanding for further consideration. See U.S. Br. 27-28.

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[8] See *United States* v. *Reeder*, 491 Fed. Appx. 487, 487-488 (5th Cir. 2012) (rejecting argument that Section 2250(a)(2)(A) is unconstitutional as applied to someone convicted of a military sex offense in 2002 and released in 2007; noting that the decision in this case "did not question" that application of SORNA), petition for cert. pending, No. 12-8664 (filed Feb. 5, 2013); *United States* v. *Rand*, No. 12-50391, 2013 WL 69352, at *1 (5th Cir. Jan. 7, 2013) (rejecting challenge by sex offender convicted after SORNA's enactment), petition for cert. pending, No. 12-9620 (filed Apr. 2, 2013).

III. THE JUDGMENT SHOULD NOT BE AFFIRMED ON ALTERNATIVE GROUNDS

Respondent urges (Br. 58-66) affirmance on the alternative ground that the Attorney General's February 2007 interim rule specifying that SORNA applies to pre-Act offenders violated the notice-and-comment and advance-publication requirements of the APA, 5 U.S.C. 553(b) and (d). The Court should not affirm on this ground, which was waived. Doing so would leave intact a circuit conflict about Congress's authority to enact Section 2250(a)(2)(A)—a question still pending in two other courts of appeals. See U.S. Br. 29 n.13.

A. As respondent acknowledges (Br. 58-59), he did not raise the APA challenge in the court of appeals, even before the en banc court. See U.S. Br. 7 n.3. While this Court could still reach that alternative ground, it exercises that discretion "only in exceptional cases." *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273 (2009) (quoting *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39 (1989)).

Respondent invokes constitutional avoidance (Br. 59), but that principle does not uniformly compel resort to unpreserved alternative grounds, as *Granfinanciera* illustrates. See 492 U.S. at 38-39 (resolving Seventh Amendment question and declining to address an alternative statutory ground that had not been advanced in the court of appeals). The Court is particularly reluctant to rely on an alternative ground that raises "difficult questions." *Id.* at 39. Here, although respondent sees the APA question as "fairly easy to resolve" (Br. 60), the most recent decision supporting his view generated three opinions totaling 69 slip-opinion pages, expressly acknowledging that "several difficult questions" arise simply on the standard of review. *United States* v.

Reynolds, No. 08-4747, 2013 WL 979058, at *6 (3d Cir. Mar. 14, 2013). Other courts of appeals reject respondent's view, either because the Attorney General had good cause or because defendants were not harmed by the postponement of public comment. See Pet. 8 n.4.

B. In any event, as the government has explained in other cases, see Cert. Reply Br. 11 n.5, the Attorney General had good cause to postpone notice and comment, and any APA error was harmless.

The Attorney General appropriately found good cause to act quickly in specifying that SORNA applied to pre-Act offenders. 72 Fed. Reg. 8896-8897 (Feb. 28, 2007). Respondent sees no urgency because the Attorney General waited seven months before acting (Br. 62), but it took time for defendants to contest the government's view (later adopted by five courts of appeals and the dissenters in *Reynolds*, 132 S. Ct. at 980, 985) that SORNA applied to pre-Act offenders of its own force. Moreover, under the holding in *Reynolds*, the rule provided more than "[m]ere guidance." Resp. Br. 62. It was necessary to apply SORNA to virtually all then-extant sex offenders, including the "missing sex offenders" who needed to be brought back onto registration rolls, *Carr*, 130 S. Ct. at 2240, as part of Congress's effort to replace the ineffective "patchwork" of earlier laws, *Reynolds*, 132 S. Ct. at 976, and thus mitigate the threat to public safety posed by their high risk of recidivism, *Smith*, 538 U.S. at 103.

Even assuming the Attorney General lacked good cause to postpone public comment, that procedural error was harmless. 5 U.S.C. 706 ("due account shall be taken of the rule of prejudicial error"). The Attorney General invited "post-promulgation public comments" (72 Fed. Reg. at 8896) and responded in the SORNA guidelines

by reaffirming the decision embodied in the interim rule (73 Fed. Reg. 38,031, 38,035-38,036 (July 2, 2008)).[9] Even now, respondent suggests no comments that would have persuasively shown why SORNA should not have been applied to him—as Congress fully expected it would be, see *Reynolds*, 132 S. Ct. at 984.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated or reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

APRIL 2013

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[9] Despite respondent's assertion that the interim rule "demonstrated a lack of openness on the Attorney General's part to * * * post-promulgation comments," he concedes the 2008 guidelines were "a valid regulation applying SORNA to pre-enactment offenders." Br. 58, 64-65.

AMICUS CURIAE BRIEF

No. 12-418

IN THE

Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

ANTHONY JAMES KEBODEAUX,
Respondent.

On Writ of Certiorari
to the U.S. Court Of Appeals
for the Fifth Circuit

Brief of the Cato Institute as *Amicus Curiae* in Support of Respondent

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QUESTION PRESENTED

Can the United States use the Necessary and Proper Clause to assert perpetual jurisdiction over someone merely because he once was within federal jurisdiction?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case concerns Cato because it involves a potentially far-reaching and dangerous assertion of federal power.

SUMMARY OF ARGUMENT

Amicus submits this brief to highlight the impropriety of the federal government's claiming jurisdiction over Anthony Kebodeaux for failing to update his change of address pursuant to the Sex Offender Registration and Notification Act (SORNA) when he moved intrastate. Mr. Kebodeaux had completed his sentence, was no longer in federal custody or the military, and was not under any supervised release or parole. In short, he had no special relationship with the federal government that

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission.

would justify his continued and indefinite supervision.[2]

The continued monitoring of Mr. Kebodeaux is improper under this Court's recent clarification of the term in both *United States v. Comstock*, 130 S. Ct. 1949 (2010), and *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). Although cases analyzing the "proper" component of the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18, are historically rare in this Court's jurisprudence, those recent cases affirm the "elementary canon of construction which requires that effect be given to each word of the Constitution." *Knowlton v. Moore*, 178 U.S. 41, 87 (1900). The Court has made clear that a law may be unconstitutionally improper even if it is "necessary."

The Supreme Court "ha[s] been very deferential to Congress's determination that a regulation is 'necessary.'" *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.). The major cases interpreting the meaning of "necessary" focus on the nature of the object being regulated and its relationship to a power of Congress. *See, e.g. United States v. Lopez*, 514 U.S. 549, 567 (1994) (holding that the "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate

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[2] This brief assumes the validity the above assessment, which accords with the en banc decision below that Kebodeaux's release was "unconditional" and thus not subject to registration requirements under the Watterling Act because "only sex-offenders residing in non-compliant states were subject to federal registration for intrastate changes of residence." *United States v. Kebodeaux*, 687 F.3d 232, 235 n.4 (5th Cir. 2012) (en banc). However, as briefly discussed below, Petitioner's position is problematic even if this statutory analysis is incorrect.

commerce."); *United States v. Morrison*, 529 U.S. 598, 613) (2000) (overturning the Violence Against Women Act because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); *Gonzales v. Raich*, 545 U.S 1, 25 (2005) (defining "quintessentially economic" activities as pertaining to the "the production, distribution, and consumption of commodities."). The connection between the regulated object and interstate commerce can be quite attenuated, yet Congress will receive deference if that connection does not violate the rule that the object must in some sense be "economic." *Id.*

Without the propriety requirement, a test based on mere usefulness and convenience would soon become a backdoor to an unbounded field of federal power. Much like the proximate cause test for causation in torts, the propriety test limits congressional power to something more than mere examination of links in a causal chain that are "useful" or "convenient." In *NFIB*, this Court made clear that mere convenience and usefulness were not sufficient to sustain a statute under the Commerce and Necessary and Proper Clauses, *NFIB*, 132 S. Ct. at 2590-92, and that the Constitution does not give the federal government an "indefinite supremacy over all persons and things." *The Federalist* No. 39 (James Madison) (Clinton Rossiter ed., 1961).

Mr. Kebodeaux's detention is improper for two distinct reasons. First, it amounts to the exercise of a "'great substantive and independent power' beyond those specifically enumerated" in the Constitution. *NFIB*, 132 S. Ct. at 2591 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 411 (1819)); second, the logic of the government's position would

give it virtually unlimited power to regulate nearly all Americans. This undermines the Constitution's "careful enumeration of federal powers." *Morrison*, 529 U.S. at 618 n.8.; Cf. Ilya Somin, *The Individual Mandate and the Proper Meaning of "Proper," in The Health Care Case: The Supreme Court's Decision and Implications* (Gillian Metzger, Trevor Morrison, & Nathaniel Persily, eds., Oxford University Press) (forthcoming) available at http://ssrn.com/abstract=2167381 (explaining how these two standards are separate, though overlapping, tests of propriety). The government's position in this case also runs afoul of four of the five factors applied by this Court in *United States v. Comstock*, 130 S. Ct. 1949 (2010). Those factors are best understood as standards of propriety.

Unlike in the adjudication of issues related to necessity, Congress does not receive deference under the test for propriety. *See, e.g., NFIB*, 132 S. Ct. at 2591-92 (applying propriety constraints without deferring to the federal government's assertions of power). Even if asserting jurisdiction over Mr. Kebodeaux could be tied to an enumerated power of Congress through a chain of "necessary" connections, it would not be proper to do so. Mr. Kebodeaux sits outside of Congress's jurisdiction, and the solicitor general's arguments that he is within congressional jurisdiction amount to an improper grant of a great, independent, an unbounded power that tramples on the traditional police powers of the several states.

In this case, as in others, the Necessary and Proper Clause has become "the last, best hope of those who defend *ultra vires* congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997). To prevent the Clause from becoming a back door to

unconstrained federal power, and it is essential for this Court to enforce the requirement of propriety.

ARGUMENT

I. MR. KEBODEAUX'S DETENTION IS IMPROPER BECAUSE IT REQUIRES THE ASSUMPTION OF A GREAT, SUBSTANTIVE, AND INDEPENDENT POWER BEYOND THOSE ENUMERATED IN THE CONSTITUTION

Imprisoning past sex offenders for failing to register under a law passed after their unconditional release from federal custody may be "necessary" to forwarding Congress's goal of monitoring sexually dangerous individuals in order to minimize the risk they pose to society. It is improper, however, to allow Congress to expand its power in such a novel and limitless way. The government claims that its assertion of federal power is modest because it is limited to persons who have "greater ties" to federal jurisdiction. The problem with this theory is that huge numbers of people have ties to federal jurisdiction just as "great" as Mr. Kebodeaux's. Unconstrained federal authority to register, regulate, and detain all of these persons clearly constitutes a new great and independent realm of federal power.

The Necessary and Proper Clause only grants Congress powers that are "incidental to the [enumerated] power, and conducive to its beneficial exercise." *McCulloch*, 17 U.S. (4 Wheat.) at 418. While the "necessary" prong of the clause allows Congress any means that are "useful" or "convenient"

to executing the enumerated powers, *id.* at 413-15, the "proper" element prevents Congress from creating a "'great substantive and independent power' beyond those specifically enumerated." *NFIB*, 132 S. Ct. at 2591 (quoting *McCulloch*, 17 U.S. at 411); Cf. Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 DUKE L.J. 267 (1993) (explaining the original meaning of "proper" as a constraint on federal intrusion into the domain of the states).

Were the Necessary and Proper Clause just a "Necessary Clause," this Court's inquiry could be confined to a means/end analysis of whether a given law or assertion of jurisdiction is convenient, useful, or conducive to Congress's execution of an enumerated power. Yet this Court is also bound to strike down laws that "undermine the structure of government established by the Constitution," *NFIB*, 132 S. Ct. at 2592, because they are improper, even if necessary.

Mr. Kebodeaux's detention is not incidental to an enumerated power. Rather it is a new substantive power that is in fact greater than the powers which the government claims to be executing. An incidental power can be described as a power that is "less worthy" than the enumerated power that it is joined to. Gary Lawson & David B. Kopel, *Bad News for Professor Koppelman: The Incidental Unconstitutionality of the Individual Mandate*, 121 YALE L.J. ONLINE 267 (2011). Any other interpretation would have the Necessary and Proper Clause to granting powers that are in fact greater than those enumerated.

The government claims that maintaining jurisdiction over Mr. Kebodeaux helps monitor a "'legitimate' collateral consequence of conviction that is intended to protect the community." Pet. Br. at 15. Yet any risk posed by a former offender many years after his "unconditional" release is hardly a genuine "collateral consequence" of his original conviction. Presumably, he would pose as much or more risk to the community had he never been convicted for his previous crimes in the first place. The government's position implies that there is a federal interest in the possible future crimes of anyone who has ever been convicted of a federal offense in the past. With only narrow exceptions—punishing counterfeiting, U.S. Const. art. I, §8, cl. 6, and punishing piracy, felonies committed at sea, and "Offenses against the law of nations," U.S. Const. art. I, §8, cl. 8—Congress lacks an enumerated power to punish criminals, much less monitor previously released criminals in perpetuity. Providing general criminal enforcement within its jurisdiction, such as within federal enclaves, is itself a power incidental to the greater power to set up such jurisdictions in the first place.

Here, the government's argument ultimately creates a power that is several steps beyond incidental and instead becomes a "great substantive and independent power." The power to monitor in perpetuity those who were once in federal jurisdiction and to impose new and onerous restrictions on them at Congress's will is unquestionably great and could fundamentally change the relationship between U.S. citizens and the federal government. As a practical matter, it would give Congress unlimited life-long authority to impose regulations on any of the hundreds of

thousands of people who have been in federal custody at some point in their lives. Had the Framers intended this power to reside in Congress they would have listed it among those powers enumerated in Article I, Section Eight.

Not being a government, like the states, empowered to legislate "numerous and indefinite" issues, the federal government must restrict itself to powers that are "few and defined" and those powers which are incidental to enumerated powers. *The Federalist* No. 45 (James Madison) (Clinton Rossiter ed., 1961). At the very least, this must mean that it is possible for someone to exit federal subject-matter jurisdiction by ceasing to do whatever action implicated federal jurisdiction in the first place, *e.g.* ceasing economic activities that are in the realm of interstate commerce. Or, conversely, if an action once brought someone into federal jurisdiction, such as committing a federal crime, then an unconditional release must mean that the federal government has relinquished control. That control cannot return without another action sufficient to bring the citizen back into Congress's jurisdiction. This dynamic is all the more important because Congress's power within its jurisdiction is generally thought to be "plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942).

II. MR. KEBODEAUX'S DETENTION IS IMPROPER BECAUSE IT CANNOT BE JUSTIFIED WITHOUT GIVING CONGRESS UNLIMITED AUTHORITY TO REGULATE VIRTUALLY ALL AMERICANS

In *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), this Court held that an inactive person could not be brought under federal jurisdiction pursuant to the Commerce and Necessary and Proper Clauses if that person was not engaging in economic activity. "The power to *regulate* commerce presupposes the existence of commercial activity to be regulated." *Id.* at 2586. To hold otherwise, "would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and . . . empower Congress to make those decisions for him." *Id.* at 2587.

In *NFIB*, this Court understood that inactive individuals have a direct link to commerce and that compelling their behavior was arguably "necessary" to regulating commerce. As Chief Justice Roberts wrote, "[t]o an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce." *Id.* at 2589. Nevertheless, this Court found such a legal command to be improper, even if necessary: If "Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it," then "[e]ven if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a 'proper' means for making those reforms effective." *Id.* at 2592. To uphold the government's arguments "would erode those limits, permitting Congress to reach beyond the natural

extent of its authority, 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'" *Id.* at 2589 (quoting *The Federalist* No. 48 (James Madison)).

The theory by which the government seeks to regulate Mr. Kebodeaux would also improperly extend the "sphere" of congressional power to a nearly boundless degree. In *NFIB*, the government unsuccessfully argued that the possibility that uninsured individuals may seek health care in the future made them "active in the market for health care" and thus regulable prior to actually entering the market. *NFIB*, 132 S. Ct. at 2589-90. Yet, because the class of those who may possibly enter the market for health care is co-extensive with the class of all U.S. citizens, Congress would by this theory obtain a general police power akin to that possessed by the states.

The government claims that its assertion of jurisdiction over Kebodeaux is not a major assertion of federal power because it is just an extension of a previous registration requirement. Pet. Br. 20-27. But this argument would justify the gradual imposition of endless new requirements on anyone who had previously been subject to federal jurisdiction. If the federal government can use the initial registration requirement imposed on Mr. Kebodeaux to justify the supposedly modest new requirements of SORNA, it can then use SORNA itself to justify still further additional impositions, and so on. Each further step might be modest in itself, but cumulatively they would amount to unlimited federal authority over anyone who has ever been held in federal custody or subject to any federal registration requirements.

In this case, the theory proposed by the Petitioner is equally boundless, equally unprecedented, and equally as improper as the theory rejected by this Court in *NFIB*. At the time he was arrested for failing to register his change of address, Mr. Kebodeaux had no special relationship with the federal government. His past crime had once placed him under federal power. But, as the en banc Fifth Circuit held, he was later properly released from that jurisdiction.

Whether or not Congress "has the power to require federal sex offenders to register with state sex-offender registries following their release and to penalize their failure to do so," Pet. Br. at 33, because Mr. Kebodeaux was *unconditionally* released from federal control, he was not in a category *properly* under federal jurisdiction. It would thus be improper to permit Congress to compel him to act merely because he was *once* convicted of a federal crime—at least without a further jurisdictional hook, such as interstate travel. This jurisdictional gap follows from the word "unconditionally." The theory proposed by the government is "no different from saying that Congress has such an interest over anyone who ever committed *any* federal crime, because there is nothing that is constitutionally special about sex crimes." *Kebodeaux*, 687 F.3d 232, 242.

The government seeks to connect the likelihood of a sex offender's future criminal behavior to its justification for asserting jurisdiction and, in so doing, articulate a limiting principle that confines that jurisdiction to sex offenders. It hopes this Court will rely on "Congress's judgment that the federal government has greater ties to former federal sex

offenders than it does to other members of the general public, whether those sex offenders were under federal criminal supervision at the time or had completed their criminal terms[,]" Pet. Br. at 34, as well as the "direct tie between the sexual nature of the conviction and the resulting regulation obligation." *Id.* at 36. But sex offenders are far from the only ex-convicts who might commit additional crimes in the future. It is not clear why their ties to the federal government are necessarily "greater" than those of people once imprisoned for murder, theft, securities fraud, or tax evasion.

The government performed an "about-face" on the Commerce Clause in the en banc Fifth Circuit. *Kebodeaux*, 687 F.3d. at 247 (calling it an "about-face" that "the Solicitor General has expressly denied that §2250(a)(2)(A) is constitutional as a regulation of the channels of interstate commerce[.]"). Yet the government still partially relies on the Commerce Clause explicitly, see Pet. Br. at 50-51, by advancing the theory that the government may monitor persons in the class of persons who had previously been adjudicated federal sex offenders because they *might* "use the channels of interstate commerce" to "evad[e] a State's reach." *Carr v. United States*, 130 S. Ct. 2229, 2238 (2010). In other words, part of the federal government's justifiable interest in the class of sex offenders is predicated on interstate commerce concerns.

Ultimately, all of the government's analysis goes to the potential "necessity" of reaching this previously adjudicated but now released class of felons. "SORNA's registration provision and criminal penalty for federal sex offenders are 'means . . . "*reasonably adapted*" to the attainment of a

legitimate end under' the enumerated powers that justify the creation of the offenders' statutes of conviction. Pet. Br. at 31-32 (internal citations omitted) (emphasis added). "Section 2250(a)(2)(A) is *reasonably adapted* to serve those legitimate ends, enforcing sex-offender-registration obligations for individuals whose underlying federal offenses were of a sexual nature." *Id.* at 33 (emphasis added). The government never addresses whether the rationale by which it can reach these former offenders can be sufficiently limited to be a "proper" assertion of federal power.

But it would be improper for Congress to assert perpetual jurisdiction over those unconditionally released from federal jurisdiction based on the theory that the *previous reason* for asserting jurisdiction over them creates "greater ties" to the federal government that can justify imposing mandates on this class. Yet this is precisely what the government unabashedly argues here: "The *logical basis* for attaching a collateral registration consequence to a federal criminal conviction *does not disappear at the moment of a prisoner's release.* As the Court's decision in *Smith* confirms, a post-release imposition of a registration requirement serves the *same valid public-protection purposes* as the registration requirement imposed during supervised release." Pet. Br. at 35 (citing *Smith v. Doe*, 538 U.S. 84 at 103-04 (2003) (holding that sex-offender registration does not violate the Ex Post Facto Clause) (emphasis added). In short, it is "public protection" that provides "the logical basis" for asserting a *new* federal jurisdiction over previously released offenders. But such a rationale is nothing more than the assertion of a police power over the general

public akin to that possessed by the States. And such a rationale cannot be limited to previously-released offenders.

The government uses this Court's sex-offender registry precedents—e. g. *Carr v. United States*, 130 S. Ct. 2229 (2010); *Smith v. Doe*, 538 U.S. 84 (2003); *United States v. Comstock*, 130 S. Ct. 1949 (2010)—to underscore the special relationship between the federal government and sex-offenders within federal jurisdiction. In this way, the federal government seeks to breach the enumerated powers scheme of Article I by stretching this Court's previous decisions to ratify the government's theory that "once in a special relationship; always in a special relationship." If permitted, this theory has no limits.

That this Court has previously given special attention to a sub-class of people who are presently within federal jurisdiction (e.g. sex offenders) does not mean that those who were *previously* in that sub-class, but are no longer, carry that special relationship with them forever. Recidivism is common with many categories of crimes. Under the government's theory that "a post-release imposition of a registration requirement serves the same valid public-protection purposes as the registration requirement imposed during supervised release," Pet. Br. at 35, Congress can assert its perpetual authority over anyone who has committed a federal crime whenever it decides that a class of previously released criminals pose a sufficient risk of future criminal conduct.

The "necessary" element of the "Necessary and Proper Clause" may allow Congress to make such determinations about which class of criminals

currently under federal jurisdiction pose signification risks of future criminal conduct. The "proper" element, however, does not allow Congress to apply this logic in such a limitless manner to extend to those who are no longer within its jurisdiction.

At bottom, the government bases its claim of power to compel the respondent's conduct on the fact that he was previously under the jurisdiction of the United States and poses a greater risk to public safety than does the citizenry at large. Stripped to its essence, the government's argument would ultimately allow perpetual jurisdiction over *anyone* merely because they were *once* subject to federal jurisdiction and are now deemed to be dangerous to the public.

Moreover, the government's theory cannot be limited to past federal criminals. After all, anyone who was once under Congress's jurisdiction for any reason may later pose a threat or an obstacle to a future congressional goal. To allow Congress to regulate any citizen who was ever in federal jurisdiction on this premise is to improperly give Congress a vast and unbounded power.

In a sense, the government's theory treats federal jurisdiction like the Hotel California: You can enter any time, you may even be able to check out, "[b]ut you can never leave." The Eagles, "Hotel California," on *Hotel California* (Asylum Records 1977). Virtually everyone has entered federal jurisdiction at some point in the past and will likely reenter it in the future. But Congress lacks the ability to "regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions," *NFIB*, 132 S. Ct. at 2591. For the same

reasons, Congress cannot regulate an individual from cradle to grave simply because he was once within its jurisdiction. That cannot be the proper standard for a Congress whose powers are "few and defined." *The Federalist* No. 45 (James Madison) (Clinton Rossiter ed., 1961).

III. MR. KEBODEUX'S DETENTION IS IMPROPER UNDER *UNITED STATES V. COMSTOCK*

In *United States v. Comstock*, this Court held that Section 4248 of the Adam Walsh Act was valid under the Necessary and Proper Clause. 130 S. Ct. at 1956-67. That provision gave federal prison officials the power to detain "sexually dangerous" federal prisoners after the completion of their sentences. 42 U.S.C. § 4248. The Court cited five factors justifying its decision to uphold Section 4248: "(1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope." *Id.* at 1965; Cf. Ilya Somin, *Taking Stock of* Comstock: *The Necessary and Proper Clause and the Limits of Federal Power,* 2009-2010 Cato Sup. Ct. Rev. 239, 260-67 (discussing the five factor test in detail).

We fully endorse the arguments offered by Respondent, Br. of Resp't at 23-40, as well as those articulated by the Fifth Circuit en banc decision, *Kebodeaux*, 687 F.3d at 236-45, that explain why the *Comstock* factors cut against Kebodeaux's detention.

Here, we highlight how the factors not only support Respondent's position, but also relate to constitutional standards of propriety.

A. The Five *Comstock* Considerations Weigh Against Mr. Kebodeaux's Detention.

1. Mr. Kebodeaux's detention is not justified by any long history of federal involvement in the relevant field.

Comstock described the post-detention civil-commitment of prisoners *already in federal custody* as a "modest addition" to a "longstanding history of related federal action." *Comstock*, 130 S. Ct. at 1958. There is nothing "modest" about the government's efforts to claim an endless "special relationship" with anyone ever convicted of a federal crime.

Examining the federal government's "long history of involvement" in an area is primarily an inquiry into the propriety of a law. *Id.* at 1965. A "long history" strongly implies that Washington, D.C. has been properly respecting the traditional powers of the states. It certainly cannot be considered an inquiry into necessity, since novel extensions of federal power may often be "convenient" or "useful" for a variety of federal purposes.

Alexander Hamilton, who took a broader view of federal power than almost any other Framer, made this aspect of propriety very clear in *Federalist* 33. To illustrate the concept of an improper law, he referred to one that "attempt[ed] to vary the law of decent in any state," or one that "undertake[s] to abrogate a land tax imposed by the authority of the state." *The Federalist* No. 33 (Alexander. Hamilton)

(Clinton Rossiter ed., 1961). Obviously, state inheritance laws and land taxes affect interstate commerce. Abrogating those laws could surely be "useful" or "conducive" to some end sought by Congress pursuant to its interstate commerce power. But it would be improper for Congress to intrude in matters of traditional state concern. Here there is no question of degree; it is a question of kind.

In Mr. Kebodeaux's case, being turned into a permanent ward of the federal government in the area of criminal law intrudes on the traditional state authority over criminals within a state's borders. Unquestionably, state authority over local criminal laws has historically been greater than federal authority. Yet allowing Mr. Kebodeaux to be imprisoned under the government's theory flips that relationship on its head.

What the government seeks here has never been asserted before. In the words of the en banc lower court, "The Department of Justice cannot find a single authority from more than two hundred years of precedent, for the proposition that it can reassert jurisdiction over someone it had long ago unconditionally released from custody just because he once committed a federal crime." *Kebodeaux*, 687 F.3d at 238.

2. The government lacks "sound reasons" for maintaining control over Mr. Kebodeaux.

In *Comstock*, this Court held that Congress's continued commitment of "sexually dangerous" inmates for a period after their sentence ended was a "reasonably extended" use of longstanding federal

powers over its inmates. *Comstock*, 130 S. Ct. at 1961. It therefore had "sound reasons" for seeking to maintain control over Mr. Comstock. *Id.* at 1965. That reasoning only applies to those currently in federal custody. If the government believed that Mr. Kebodeaux continues to pose a threat to those around him, then it should not have unconditionally released him from federal control in the first place.

Given that Mr. Kebodeaux had been out of federal custody for many years when the government sought to reassert control over him, it is difficult to see why there is any federal interest in detaining him that would not also apply to anybody in the United States who might be considered dangerous in some way.

Moreover, it would be improper to allow Congress to expand its jurisdiction so broadly and so limitlessly merely because it "reasonably" believes that someone outside of its jurisdiction poses a threat to public safety. It is certainly reasonable to believe that once-convicted criminals pose a greater threat to public safety than ordinary citizens. Again, however, this chain of reasonable links only applies to the "necessary" part of the Necessary and Proper Clause. Even if reasonable, it would be improper to give Congress such a great substantive, independent, and boundless power.

That this would be improper was admitted by then-Solicitor General Elena Kagan in *Comstock,* when she conceded that "the Federal Government would not have . . . the power to commit a person who . . . has been released from prison and whose period of supervised release is also completed." *Id.* at 1965. "Thus," as the en banc Fifth Circuit put it, "in the instant case the government is reneging on

precisely those concessions that caused the Court to reason that the civil-commitment statute" was narrowly tailored to the government's role as "custodian in the responsible administration of its prison system." *Kebodeaux*, 687 F.3d at 241 (quoting *Comstock*, 130 S. Ct. at 1965).

3. Federal detention of Mr. Kebodeaux and others similarly situated does not properly accommodate state interests.

The third *Comstock* factor asks whether a "statute properly accounts for state interests." *Comstock*, 130 S. Ct. at 1962. Like the consideration of whether a statute is part of a longstanding federal involvement, this factor is relevant to propriety rather than necessity. It can certainly be "useful" and "convenient" for Congress to ignore state interests—and Congress often does. Yet in matters of core state concern, such as criminal law, it is improper for Congress to trample state prerogatives merely because it might be convenient to do so.

"When Congress criminalizes conduct already made illegal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *United States v. Emmons*, 410 U.S. 396, 411-12 (1973)). That change can mean that Congress is punishing conduct more harshly than the state wishes. When it comes to criminal law—which is partially based on the theory that the community is signaling its opprobrium for a type of conduct—it is proper to allow for variance in the level of punishment among the different communities that make up the United States.

Unlike the statute at issue in *Comstock*, there is no provision here "by which someone federally prosecuted under SORNA can be subjected to state penalties or transferred to state custody instead." *Kebodeaux*, 687 F.3d at 243. As the Fifth Circuit noted, Texas does not wish to penalize Kebodeaux's conduct as harshly as the federal government. *Id.* at 244 n.36 ("Texas and forty-six other states do not substantially comply with SORNA.") It is improper not to allow a state to deal with its own resident on its own terms if that resident has done nothing to put himself back in federal jurisdiction.

4. The sweeping federal authority asserted by the government is not narrow in scope.

A fourth *Comstock* consideration is whether the link between the statute and "an enumerated Article I power is not too attenuated" and the application of the statute is not "too sweeping in its scope." *Comstock*, 130 S. Ct. at 1963. As explained *supra*, the logic behind that application gives rise to a "great" and "independent" power that is essentially boundless. Moreover, the necessary link is not just "attenuated," it is nonexistent.

The concern for a statute's narrowness is also highly related to propriety rather than necessity. Under a pure means/end analysis, both broad and narrow statutes might be useful or conducive to carrying into execution an Article I power. Instead, concerns about narrowness are more concerns about improperly unbounded powers given to a government with limited power. Giving Congress perpetual jurisdiction over anyone who has ever committed a

federal crime or, possibly, anyone who has ever entered federal jurisdiction is an expansive and broad power.

5. The scope of the Necessary and Proper Clause.

Although the scope of the Necessary and Proper Clause is unquestionably relevant to any inquiry into the Clause, it cannot decide this or any case by itself. Since this factor is identical in every case, it cannot by itself justify upholding a statute. If it could, the other four considerations would be superfluous. In this case, all four other factors count against the federal government's position, and that position cannot be saved by relying on platitudes about the broad scope of the Clause. Furthermore, the scope of the Clause cannot be merely asserted as a "factor" in a "test" when the reach of the Clause is precisely the question at issue. See Ilya Shapiro & Trevor Burrus, *Not Necessarily Proper: Comstock's Errors & Limitations*, 61 SYRACUSE L. REV. 413, 419 (2011).

In sum, four of the five *Comstock* factors cut against the government in this case. And the only one that does not cannot be determinative.

CONCLUSION

For the foregoing reasons, we respectfully ask this Court to affirm the decision of the en banc Fifth Circuit.

Respectfully submitted,

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